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Supreme Court of the United States

OCTOBER, 1942, TERM.

No. 905

J. W. SANDERS COTTON MILL, INC.,
PETITIONER,

VS.

LULA MOODY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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VS.

LULA MOODY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

Your petitioner, J. W. Sanders Cotton Mill, Inc., respectfully prays that a writ of certiorari issue out of this Honorable Court to review a final judgment of the Supreme Court of the State of Mississippi, rendered in the above entitled cause on the 30th day of November, 1942 (R. 532). The petitioner further shows that a suggestion of error was filed in said cause on the 14th day of December, 1942 (R. 533), within the time allowed by Rule XIV of the Supreme Court of Mississippi (Mississippi Code Supplement of 1938, page 1900), which Suggestion of Error was overruled on the 11th day of January, 1943, on which date said judgment became final. No opinion was filed in said cause by the Supreme Court of Mississippi on the appeal mentioned above, but its action is noted in 10 So. 2d 544, and is shown by the record herein.

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On November 29, 1938, the respondent herein filed her declaration in the Circuit Court of Lauderdale County, Mississippi, against the petitioner herein, to recover for personal injuries alleged to have been received while working in petitioner's cotton mill. This declaration was signed by the Honorable Fred A. Ross, as leading counsel for respondent, and M. V. B. Miller, as associate counsel. The caption, showing the organization of the court at which the cause was last tried, shows that the said Fred A. Ross was Sheriff in and for the County of Lauderdale. The testimony of Mr. Ross, given in opposition to a motion to quash the panel (R. 27), shows that Mr. Miller was the personal attorney for Mr. Ross insofar as he had need for such legal assistance.

The cause was first tried to a jury, which returned a verdict in favor of respondent in the amount of $7,000. The judgment entered on this trial was reversed by the Supreme Court of Mississippi, as will appear from the opinion rendered on said appeal, reported in 189 Miss. 284, 195 So. 83. Prior to rendering the opinion above referred to, the Supreme Court of Mississippi addressed a memorandum to the attorneys, raising certain questions and requesting that additional briefs be submitted thereon. A copy of this memorandum will be attached to the brief to be filed in support of this petition, as an appendix thereto.

On a second trial of the cause, a second verdict for respondent, in the amount of $7,000, was returned by the jury, and the judgment entered thereon was reversed by the Supreme Court of Mississippi, as shown by its opinion reported in 191 Miss. 604, 2 So. 2d, 815.

On the third trial, the jury returned a verdict in the amount of $8,000, and on the third appeal the Supreme

Court of Mississippi entered its judgment, review of which is sought by this petition, without rendering an opinion.

Respondent alleged, and the proof showed, that in the course of her employment by petitioner she attended a machine known as a spinning frame, on each side of which there is an aligned row of clearer boards, fifteen in number, forty inches from the floor, each board being about twenty-two inches long, about three and one-half inches wide, and grooved or hollowed out on the lower side, so as to be about one-half inch thick, and to weigh about one and one-half or two pounds. The lower side of each clearer board has attached to it eight felt pads, so arranged and aligned as to rest lightly upon rollers; the purpose of the clearer boards and their pads being to keep the rollers clear of lint which would otherwise interfere with the functions of the rollers. In each end of each clearer board there is a longitudinal slit about one inch long and one-fourth inch wide, designed to engage latches attached to the machine, so that a slight movement is allowed to the clearer board as their pads rub against the rotating rollers, and preventing the clearer boards from falling from the machine.

In the progress of the operations of the mill, lint will collect upon and around the rollers, and also upon the clearer boards. One of the duties which respondent was employed to perform was to remove the accumulated lint from the rollers, the clearer boards and the felt pads attached thereto. Another duty was to remove accumulated lint from a panel behind and below the rollers, by passing a brush or cleaner, called a sideboard, over and against this panel. Respondent claims to have been injured while in the process of pushing the sideboard along the panel of the machine with her right hand, while she passed her left hand over the top of the clearer boards, all of which were allowed to remain in place, to remove any accumulated lint from the top of the clearer boards; and

that as her hand passed from one of the clearer boards to another, the board over which her hand had just passed was caused to fall from the machine because of a broker latch at the end nearest her hand; the clearer board falling upon her foot and producing the injuries for which she complains.

Prior to the commencement of the third trial, petitioner filed its motion to quash the panel, on the ground that the Sheriff, who under the law was charged with duties to be performed in conjunction with other officers of the county in the drawing of the jury, and was solely responsible for the summoning and obtaining the attendance of jurors upon the court and witnesses upon the trial, and providing for the lodging, feeding and protection of the jury during the course of the trial, was the original counsel employed by respondent in this case. This motion was overruled, but the trial court displaced the Sheriff insofar as he was to perform further services in connection with the trial, and directed that the Coroner act in his stead, as required by Mississippi law.

The reversal on the first appeal to the Supreme Court of Mississippi was occasioned by excursions by respondent and her attorneys for the issues involved into wholly collateral matters prejudicial to petitioner, all as will be shown by the opinion rendered on said appeal and the memorandum submitted to the attorneys during the pendency thereof (189 Miss. 284, 195 So. 683; and see appendix to brief in support of this petition). Petitioner contends that it was denied due process of law in that the court which tried this action included among its officers, and as the principal executive officer thereof, the original attorney for respondent, whose duty it was to assist in the drawing of the jury, to serve subpoenas upon the jurors and the witnesses, and to provide for the keep and maintenance of the jurors during the course of the trial. Petitioner was further denied due process of law by virtue of the fact that the Sheriff, a political office-holder in Mississippi, and who was the original counsel

for the plaintiff, was permitted to participate in the trial of the cause as a witness, and to show, to the prejudice of the petitioner, that there was personal animosity between himself and various employees of petitioner, as well as witnesses called by petitioner to establish its defense to the action.

Petitioner contends that it was denied equal protection of the laws, in that the Supreme Court of Mississippi correctly stated the rules of law obtaining in Mississippi in such cases on the first appeal herein, and held that under such rules respondent would not be permitted to recover on the verdict rendered in a trial had in violation thereof, whereas on the third trial the same errors were committed and the same conduct indulged in by the court and counsel for respondent, as were committed and indulged in on the first trial, and the Supreme Court of Mississippi entered its judgment affirming the judgment entered on the verdict rendered on such trial contrary to the prior holdings of said court, without resorting to any contravening principle of law, and without modifying the law previously announced.

II.

OPINION BELOW.

The court did not file any opinion when it rendered its decision on the appeal in which the judgment here under review was rendered. However, its action is noted unofficially as *J. W. Sanders Cotton Mill, Inc.*, v. *Lula Moody*, No. 35074, 10 So. 2d 544.

Opinions rendered on former appeals are as follows:

Second Appeal: *J. W. Sanders Cotton Mill, Inc.*, v. *Moody*, No. 34622, 190 Miss. 604, 2 So. 2d 815.

First Appeal: *J. W. Sanders Cotton Mill, Inc.*, v. *Moody*, No. 33989, 189 Miss. 284, 195 So. 683.

III.

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under Section 240 of the Judicial Code, as amended, by Acts of February 13, 1925, Subsection (a) and (b), separately and severally, 28 U. S. C. A. 347, and also Rule XXXVIII of the Revised Rules of the Supreme Court of the United States adopted February 13, 1939.

IV.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The Supreme Court of Mississippi has decided an important question of Federal Law, which has not been, but should be, settled by this court.

(a) The decision of the Supreme Court of Mississippi, affirming the action of the Circuit Court of Lauderdale County in not quashing the venire, amounts to a holding that petitioner was accorded a fair and impartial trial within the meaning of the due process clause, where the principal executive officer of the court was the original leading counsel for respondent.

(b) The action of the Supreme Court of Mississippi, in affirming the judgment of the Circuit Court of Lauderdale County rendered at the conclusion of the third trial on which the same errors were committed as were committed on the first trial and denounced on the first appeal, results in a denial to petitioner of the protection of the law of the State of Mississippi as announced by the Supreme Court of said state on said first appeal, and which is still the law of said state.

(c) The combined effect of requiring petitioner to submit its defense to a court so organized as to have as its

principal executive officer the former leading counsel for respondent and the allowance by the trial court of excursions from the issues joined between petitioner and respondent into matters collateral and foreign to such issues but which were prejudicial to petitioner, amounts to a departure from the fundamental rules of equal justice and fair play contemplated by due process of law and equal protection of the law.

The importance of these propositions rests in the fact that if the Supreme Court of Mississippi can affirm the judgment of a court so organized as to include as its principal officer the former leading counsel of one of the litigants, and that has proceeded to hear countless collateral issues to the prejudice of the other litigant, "due process" and "equal protection" may be denied to any citizen of the United States without regard to his race, color, position or standing in the county where the action is tried.

2. The Supreme Court of Mississippi has decided an important question of Federal Law very probably in conflict with applicable decisions of this court.

This court has been at pains to lay down certain fundamental concepts of fair play as being requisite to due process of law under the Fourteenth Amendment. The decision of the Supreme Court of Mississippi upholding the action of the Circuit Court of Lauderdale County, Mississippi, is contrary to the views expressed by this court in its decision announcing such rules of fair play.

V.

QUESTIONS PRESENTED.

The questions presented for determination by this court on the grant of the writ herein prayed for are as follows:

(1) Whether or not petitioner was denied due process of law by being required to answer the action of re-

spondent and defend the same in a court in which the principal executive officer was the former leading counsel for respondent; such officer being charged with the duties of participating in the drawing of the jury, the summoning of the jurors and the witnesses, and the lodging, feeding, and protection of the jurors during the trial of litigated cases, as well as the performance of other duties required of the Sheriff by the laws of the State of Mississippi.

(2) Whether the failure of the Supreme Court of Mississippi to reverse the judgment rendered on the third trial after correctly announcing the controlling principles of law on the appeal from the judgment rendered on the first trial, where the errors committed on the first trial were apparent on the face of the record of the third trial amounted to a denial to petitioner of equal protection of the laws.

(3) Whether or not requiring petitioner to appear and defend in a court which had as its principal executive officer the former leading counsel for respondent and allowing the trial to proceed to issues collateral and irrelevant to the issues joined between petitioner and respondent, all of the evidence on such collateral and irrelevant issues being prejudicial to petitioner, amounts to a denial of "due process" and "equal protection" as being violative of the fundamental rules of fair play as contemplated by the Fourteenth Amendment to the Constitution.

(4) Whether or not the central government will intervene and protect its citizens where the laws of a state provide for and guarantee due process and equal protection, but the action of its court clothed with authority to declare such law amounts to a denial of due process and equal protection, but the manner in which the court acts is such that its action does not amount to a modification of the laws of said state.

(5) Whether or not the Supreme Court of Mississippi, which is clothed with the power and authority to declare the laws of the State of Mississippi, exhausts its function with respect to "due process" and "equal protection," where it declares the law on the first appeal in such manner as to afford "due process" and "equal protection," and on the third appeal in the same case, with the same errors apparent on the face of the record, declines to follow its former ruling, and also declines to file an opinion modifying its former holding.

VI.

SPECIFICATION OF ERRORS.

(1) The Supreme Court of Mississippi erred in affirming the judgment of the Circuit Court of Lauderdale County overruling petitioner's motion to quash the panel.

(2) The Supreme Court of Mississippi erred in entering its judgment affirming the judgment on the verdict returned at the conclusion of the trial of said cause.

(3) The Supreme Court of Mississippi erred in affirming the judgment of the Circuit Court of Lauderdale County overruling petitioner's motion for a new trial.

(4) The Supreme Court of Mississippi erred in not reversing the judgment of the Circuit Court of Lauderdale County and remanding the cause for another trial.

VII.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Supreme Court of Mississippi, commanding said court to certify and send to this court a full and complete transcript of the record and proceedings in said court had in Cause No. 35074, on the docket of said court, being entitled, *J. W. Sanders Cotton Mill, Inc.*, v. *Lula Moody,*

to the end that said cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment therein of the Supreme Court of Mississippi be reversed by this court, and for such other relief as may be proper.

J. W. Sanders Cotton Mill, Inc.
Petitioner,

By BEN F. CAMERON,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER, 1942, TERM.

No. .....

J. W. SANDERS COTTON MILL, INC.,
PETITIONER,

VS.

LULA MOODY, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

This is an application for a writ of certiorari to review the judgment of the Supreme Court of Mississippi affirming the judgment of the Circuit Court of Lauderdale County, Mississippi, awarding recovery to respondent as plaintiff in the latter court, in the amount of $8,000 against petitioner as defendant.

OPINION BELOW.

No opinion was filed by the Supreme Court of Mississippi to support its judgment, review of which is sought by the petition herein. However, opinions were rendered on former appeals in *J. W. Sanders Cotton Mill, Inc.*, v. *Moody*, 189 Miss. 284, 195 So. 683, and *J. W.*

Sanders Cotton Mill, Inc., v. *Moody*, 191 Miss. 604, 2 So. 815. The action of the court on the third appeal, and which this petition seeks to have certified to this court for review, is unofficially noted as *J. W. Sanders Cotton Mill, Inc.*, v. *Lula Moody*, 10 So. 2d 544, and is shown at pages 532 to 542 of the original Record.

JURISDICTIONAL STATEMENT.

The jurisdiction of this court conferred by Section 240 of the Judicial Code, as amended by the Acts of February 13, 1925, Subsections (a) and (b), (28 U. S. C. A., 347) is invoked by this petition. Within the time allowed by Rule XIV of the Supreme Court of Mississippi (Mississippi Code Supplement of 1938, p. 1900), petitioner filed its Suggestion of Error (R. 533), which was overruled on the 11th day of January, 1943 (R. 542). Under Mississippi practice, this was the date upon which the judgment of the Supreme Court became final. *Love* v. *Mayor and Board of Aldermen of Yazoo City*, 166 Miss. 322, 148 So. 382.

SHORT STATEMENT.

The respondent, Lula Moody, brought her action against petitioner, to recover for personal injuries alleged to have been sustained while she was employed in petitioner's cotton mill at Meridian, Mississippi. The cause was tried three times in the Circuit Court of Lauderdale County, Mississippi, the first two trials resulting in judgments on verdicts for respondent in the amount of $7,000, both of which were reversed on appeal to the Supreme Court of Mississippi. On the third trial a judgment was entered on a verdict for respondent in the amount of $8,000, and on appeal the Supreme Court of Mississippi was affirmed without an opinion. Petitioner contends that, under the law as announced on the first appeal, the judgment should have been reversed for the same

errors, and that the failure of the Supreme Court to reverse amounted to a denial to petitioner of equal protection of the laws. Petitioner also contends that the fact of respondent's leading counsel having become Sheriff of Lauderdale County, and therefore the principal executive officer charged with duties in connection with the drawing of the jury, the summoning of jurors and witnesses, and the performance of other duties in and about the court, and the injection of collateral issues into the trial, among which were the facts of personal animosities between certain of petitioner's employees, executives, and witnesses in this case, and the Sheriff and former leading counsel of respondent, amounted to a denial to respondent of due process of law.

STATEMENT OF FACTS.

Respondent brought her action against the petitioner for personal injuries. She alleged that while employed in petitioner's cotton mill, at Meridian, in Lauderdale County, Mississippi, she suffered an injury to her foot, as the result of the falling of a clearer board from a spinning frame while she was brushing the dust and lint therefrom with her left hand, while performing other functions with her right hand. The case was tried three times in the Circuit Court of Lauderdale County, and on all three trials verdicts and judgments were rendered against petitioner. On the first two trials judgments were reversed by the Supreme Court of Mississippi, as indicated above. On appeal from the third judgment, the Supreme Court affirmed without an opinion, and it is this judgment of the Supreme Court which petitioner seeks to have reviewed by this Honorable Court.

Petitioner's Defenses.

Since only constitutional questions are involved on this petition, it is not thought that a detailed statement of the very large amount of conflicting evidence as to the

happening of the occurrence, petitioner's responsibility therefor and the extent of the injury, would be helpful. However, since the Supreme Court of Mississippi held on both the first and the second appeals (*J. W. Sanders Cotton Mill, Inc.*, v. *Moody*, 189 Miss. 284, 301, 195 So. 683, 689; 191 Miss. 604, 611, 2 So. 2d 815, 816) that the evidence presented issues which required the submission of the case to the jury and it is petitioner's contention that the organization of the court and the conduct of the trial were such as to deprive it of due process of law and equal protection of the laws; a factual presentation of the matters complained of requires a more detailed study of the surrounding circumstances and conditions, in connection with the trial, than ordinarily would be appropriate.

The defenses offered by petitioner, as disclosed from the entire record, and which are summarized from the brief filed with the Supreme Court of Mississippi on the last appeal, were as follows:

I. The Motion to quash the juries because of the participation of the Sheriff in drawing and summoning them should have been sustained.

II. Plaintiff's testimony was unbelievable.

A. Plaintiff changed her whole theory of negligence.

B. Plaintiff's testimony as to the occurrence of the injury and the extent thereof was unbelievable.

C. The condition of plaintiff's foot was occasioned by injuries received on prior occasions.

III. Errors as to liability.

A. Testimony did not show any reasonable standard of care.

B. Alleged defects in the machine were not shown to be the proximate cause of the injury.

C. The evidence showed that there was a safe way to do the work as distinguished from an unsafe way, and that respondent chose the unsafe method.

D. No negligence was shown on the part of the defendant, because the evidence disclosed that the injury was not reasonably foreseeable.

E. The evidence did not disclose that respondent had any notice or knowledge of the defects in the machine.

IV. The case was tried on collateral issues, on all of which respondent was permitted to introduce testimony which was prejudicial to petitioner.

A. Other times and places.

B. Plaintiff forced to work several days after the alleged injury.

C. Personal animosities between petitioner's foreman, Anders, and other witnesses, and Sheriff Fred A. Ross, the former leading counsel for respondent.

D. Prejudicial statements of counsel as to matters not within the issues, and on which evidence was not introduced, made in the presence of the jury.

E. Leading questions propounded by counsel for respondent to respondent's witnesses.

F. Respondent permitted to present an entirely new theory in the evidence offered in rebuttal after petitioner had rested.

Sheriff Was Respondent's Former Leading Counsel.

The original leading counsel for respondent was the Honorable Fred A. Ross, of Meridian, Mississippi, and associate counsel was her present counsel, the Honorable M. V. B. Miller (R. 8). After the action was tried the first time, and while the first appeal was pending, Attorney Ross was elected to the office of Sheriff by the Popular vote of Lauderdale County, and qualified and assumed the duties of that office (R. 22).

Section 3310 of the Mississippi Code of 1930 provides:

> "Every Sheriff shall have power to appoint one or more deputies, and to remove them at pleasure; every appointment to be in writing * * *"

Section 3316 of the Mississippi Code of 1930 provides as follows:

> "Every Sheriff, by himself or his deputy, shall from time to time execute all notices, writs, and other process, both from courts of law and chancery, and all orders and decrees to him legally issued and directed within his county, and shall make due returns thereon to the proper court * * *"

Section 3315 of the Mississippi Code of 1930 provides as follows:

> "The sheriff shall be the executive officer of the Circuit and Chancery Court in his county, and shall attend all the sessions thereof with a sufficient number of deputies or bailiffs. He shall execute all orders and decrees of said courts directed to him to be executed, and shall take into his custody and safely keep in the jail of his county, all persons committed by the order of either of said courts, or by any process issuing therefrom, or lawfully required to be held for appearance before either of them."

Section 3329 of the Mississippi Code of 1930 provides as follows:

> "It shall be the duty of the Sheriff to keep the peace within his county, by causing all offenders in his view to enter into bond, with sureties, for keeping the peace and for appearing at the next Circuit Court, and by committing such offenders in case of refusal; which bonds he shall certify and return to the court. It shall be his duty to quell riots, routs, affrays and unlawful assemblages, and to prevent lynchings and mob violence, and whenever necessary he shall call to his aid the power of the county; and any person who shall fail, neglect or refuse to respond to the call of the sheriff for such aid shall be

reported by the sheriff to the Circuit Court, and it shall be his duty to prosecute all such persons, who, upon conviction, shall be punished as for a misdemeanor. * * * He shall pursue, apprehend, and commit to jail all persons charged with treason, felony, or other crimes; and he may take bonds, with good and sufficient sureties, of any person whom he may arrest on the process of any circuit court charged with any crime not punishable with death, conditioned for the appearance of the offender at the next term of said court, and fix the amount of such bonds, in case the court or judge has omitted to do so, unless the process be returnable forthwith."

It will be noted from the foregoing section that in addition to his duties as executive officer of the court, the Sheriff exercises certain functions which are judicial in character, and that as the chief conservator of the peace in his county, he is given direct and specific command and authority over all of the citizens thereof, both with respect to the crimes they may have committed, and with the assistance that they may be required to give in apprehending offenders and enforcing the law.

Section 3331 of the Mississippi Code of 1930 provides as follows:

"The Sheriff shall have charge of the court house and jail of his county, and the premises belonging thereto, and of the prisoners in said jail, and he shall preserve the said premises and prisoners from violence, and from any injuries or attacks by mobs or otherwise, and from trespassers and intruders. * * *"

In addition to the foregoing, the Sheriff is made the tax collector of his county by Section 3341 of the Mississippi Code of 1930. Section 3001, Mississippi Code of 1930, provides as follows:

"The first process in all cases, civil and criminal, and in all courts, to compel the attendance of witnesses, shall be a subpoena, directed to the Sheriff or to some proper officer of the county where the

witness may reside, stating the time and place for the appearance of the witness, the parties to the cause, and the party at whose instance the witness is subpoenaed. * * *"

Section 3005 of the Mississippi Code of 1930 provides as follows:

"Subpoenas shall be served personally as a summons is required to be served; and the person so subpoenaed shall appear; if a civil suit be settled * * *"

Section 2033 of the Mississippi Code of 1930 provides as follows:

"The Board of Supervisors at the first meeting in each year, or at a subsequent meeting if not done at the first meeting, shall select and make a list of persons to serve as jurors in the Circuit Court for the twelve months beginning more than thirty days afterward, and as a guide in making the list they shall use the registration book of voters, and shall select and list the names of qualified persons of good intelligence, sound judgment, and fair character, and shall take them as nearly as they conveniently can, from the several supervisor's districts in proportion to the number of qualified persons in each, excluding all who have served on the regular panel within two years, if there be not a deficiency of jurors. * * *"

Section 208 of the Mississippi Code of 1930 provides as follows:

"The Sheriff of the county shall attend all meetings of the Board of Supervisors, either in person or by deputy, and shall execute all its process and orders; for which actual attendance he shall be allowed his fees by the Board, as fixed by law."

Section 2039 of the Mississippi Code of 1930 provides for the drawing of jurors under the supervision of the Judge of the Circuit Court. However, an alternative method is provided by Section 2041, and the record in this case shows from the testimony of Sheriff Ross and his deputies (R. 21-22) that the alternate method was followed

at the term in which this case was tried. Section 2041 provides as follows:

> "Whenever the jurors have not been drawn by the Judge in open court, he may draw them in vacation, if convenient; and if he do not, and whenever jurors are required for a special term and the Judge so directs, the clerks of the Circuit and Chancery Courts and the Sheriff shall, at the time they should have opened the envelopes, draw the jurors for the term of court, and make and certify lists thereof; and the Clerk shall issue and deliver to the Sheriff the proper venire facias."

Section 2044 provides that,

> "The Sheriff shall forthwith execute the venire facias by summoning each juror at least five days before the first day of Circuit Court, if practicable, either by personal service or by leaving a written notice at his usual place of abode; and he shall make return of the venire on the first day of the term. And any juror who, being summoned, does not attend, shall be fined not exceeding $100; * * *"

Prior to the commencement of the trial, petitioner moved to quash the jury which the Sheriff had participated in drawing from lists prepared by the Board of Supervisors while he was on attendance with the Board as its principal executive officer, either in person or by deputy. The testimony (R. 22 to 45) showed that all of the functions required of the Sheriff were performed by him in the normal manner, as contemplated by statutes. Every juror on attendance at the court, and every witness who attended in response to a subpoena, had been served by the Sheriff or his deputies.

The trial judge undertook to discredit this showing by stating into the record (R. 40) that supplemental jurors were drawn in open court. The court further undertook to preserve the appearance of fairness by disqualifying the Sheriff from acting in the course of the trial, and qualifying the coroner to act in place of the Sheriff pursuant to Mississippi Code of 1930, Section 651 (R. 44).

It will be noted that the Sheriff continued to function as chief executive officer of the court, pursuant to Section 3315, *supra,* except in connection with the trial of this case; that he continued as the chief peace officer of the County, pursuant to Section 3329, *supra,* except that he was not required to keep order in the court room; and that he continued to have charge of the Court House and Jail and the premises belonging thereto, and perform the duties with respect thereto required of him by Section 3331, *supra.*

Collateral Issues.

During the pendency of the first appeal in this case, the Supreme Court of Mississippi addressed a memorandum to the attorneys of record. A copy of this memorandum will be attached to this brief as an appendix thereto, but, for convenience, the following portion is quoted:

> "* * * but there is too much danger in allowing examinations to go to such lengths that the particular merits may be obscured and that passion may be aroused by these extraneous considerations * * * it (cross-examination) should never be permitted to proceed so far into collaterals as to raise a doubt whether the verdict is upon the real issues or whether upon general principles that the plaintiff or the defendant, one or the other, is by his general character or conduct deserving of a verdict against him, be the precise facts what they may * * *"

All of the instances in which the trial was allowed to proceed into collateral issues will not be referred to in this brief summary. However, certain of the more glaring instances will be pointed out.

1.

OPERATION BY OTHERS AT OTHER TIMES AND PLACES.

Witnesses were permitted to testify about the breaking of thread at various times and places (R. 67), about the use of sideboards (R. 67), that other times and places

operatives moved fast (R. 74), and used hooks and instruments (R. 80), and where an operative's eyes were centered at other times and places (R. 190-1, 211). Witnesses were permitted to testify as to how certain operations were carried on in other mills (R. 209-10), the age of the spinning frames in the room where respondent alleged she was injured (R. 350), how each particular operative performed the simple operation of cleaning these clearer boards (R. 71, 74-5, 80, 107-8, 177, 189, 208, 217, 231-2), and that repairmen had broken latches (R. 308-9) and replaced them (R. 312-13) at other times and places.

Respondent went so far into collaterals as to show by witnesses who had not worked at the mill for three years (R. 297) and eighteen years (R. 212), the details of how and what was done at these remote times.

The recurrence of this sort of testimony was manifold. It laid emphasis on the fact that respondent and all others who worked at the mill were required to go speedily from place to place as the operation of the machine demanded their attention. It tended to create the impression that thread was constantly breaking, and that the eyes of the spinners were focused on certain things, and that other spinners performed certain operations in various ways. Other instances of excursions into collaterals are presented in the record at pages 67-71, 73-75, 80, 97-100, 107-112, 180-2, 189-90, 208-11, 217, 231-2, 312-13, 350.

Respondent was permitted to play on the sympathies of the jury by repeating, over the objection of petitioner, that she was poor and had to work, and the jury was permitted to infer that she was compelled by petitioner to work (R. 97, 100, 176).

2.

PREJUDICIAL STATEMENTS OF COUNSEL NOT SUPPORTED BY EVIDENCE.

There are numerous instances in the record (too many to catalog) in which respondent's counsel made side remarks in the presence of the jury for the obvious

purpose of prejudicing it against petitioner. An instance of this is shown in the record at page 326, when petitioner's attorney was engaged in developing from the witness Anders, petitioner's spinning foreman, that the witness was interested only in the results obtained and not in the details of the methods employed by the individual spinners in performing their work. The following occurred:

> "Q. What was it that you, as head of that spinning department were interested in as to that?
>
> By Mr. Miller: We object to what he was interested in as to that.
>
> By the Court: Overruled.
>
> By Mr. Miller: He was interested in making the money in the Mill. We object to what he was interested in.
>
> By Mr. Cameron: We move to exclude counsel's statement that he was interested in making money for the Mill."

Another instance appears in the record at page 122:

> "Wait a minute, Miss Moody. I asked Mr. Cameron to let me go the other day. He objected to me going. I asked him to let me send someone. Now, he wants to take this woman and send her up there, and we object to it."

Under the guise of cross-examination, and in ostensible attempt to lay predicate for the impeachment of witnesses, respondent's counsel injected countless inuendoes and statements into the proceedings with the view of obscuring the real issues and prejudicing the jury against petitioner. Thus, at page 344 of the Record, we find the following:

> "Well, while you were looking at the frames every day, did you see poor old Lula dragging herself there with that crippled foot?"

3.

SHERIFF ROSS MADE AN ISSUE IN THE TRIAL.

By means of side remarks and unsworn statements such as those mentioned above, and improper cross-examination, respondent was given the advantage of the prestige and popularity of Sheriff Ross in contrast to the prejudice and passion aroused against petitioner. First, the witness Anders was grilled as to whether or not he had engaged in the process of shadowing witnesses who had come to Ross's office to talk about the case (R. 340-1). Thereafter, the court permitted Ross to be recalled to the witness stand to testify concerning the animosity between himself and Anders (R. 464, 482-5). The same procedure was followed with reference to the testimony of petitioner's witness, Dr. Klein. This witness was grilled at length concerning his alleged mistreatment of Sheriff Ross (R. 367-70, 378, 440-1).

That respondent received full benefit from this prejudicial conduct is disclosed by a few excerpts from the argument to the jury:

> "That ain't all gentlemen. When those humble witnesses go to consult with the man who is to speak in this court room in the interest of the rights of that woman, follow them around. Whenever they intimidate witnesses, gentlemen, they got an unjust cause, you know it" (R. 12).
>
> "Just like it is in life when it comes to medical services. Yes, those that have got it to pay for it go have the high and mighty from the various hospitals * * * I will put it this way—can hire the kind Mr. Cameron recommends so highly to you as being such noted experts" (R. 516).
>
> "Yes, Lula's kind, just as in life, get along as best they can" (R. 516).
>
> "Do unto this woman as you would have somebody do to your baby. Give her a fair deal, don't rob her because she is from the low, and the meek, and the humble."

ARGUMENT.

As stated above, a fair presentation of this case requires a more detailed consideration of the actual setting in which it was tried than ordinarily would be undertaken. The attention of the court is called to the case of *Thomas Henry Trott, Petitioner,* v. *McDonough Motor Express Company, Inc., a Corporation et al., Respondent,* now pending on application of the petitioner for leave to proceed *in forma pauperis.* It will be noted that the Honorable M. V. B. Miller, Attorney for Respondent in this case, was attorney for respondent, McDonough Motor Express Company, who was the defendant in the court below in the Trott case. Moreover, it will be noted that petitioner's present attorney in this court was appearing on behalf of Trott, the plaintiff, on the trial of this action against McDonough; the position of the parties being exactly reversed as to their representation of plaintiffs or defendants. The following quotation is taken from the testimony of Sheriff Fred A. Ross, the former leading counsel for Respondent, and the present Sheriff of Lauderdale County, as the same appears at pages 27 and 28 of the Record herein:

> "Q. Mr. Martin Miller, the attorney handling this case, is your personal attorney, is he not?
>
> A. Well, if I have a personal attorney, he would be it. I don't have an attorney employed regularly, and haven't had an occasion in my two years in the Sheriff's office to have one. Frankly, I have been lucky. But Mr. Martin Miller would represent me if I had a matter in court. But he is not my attorney in the sense he is employed. He is one simply I would go to because I recognize his legal ability.
>
> Q. He was your campaign manager for Sheriff?
>
> A. No, he supported me, helped me get elected. But I was my own campaign manager. I didn't have enough money to hire one, that is the truth about it."

In view of the foregoing and in order that the court may have the benefit of such assistance as may be rendered, the brief filed in support of the petition of Trott is presented herewith as an appendix to this brief. Petitioner feels that all that was said on behalf of Trott may be repeated with like force and multiple application in support of its petition.

As has already been indicated, petitioner contends that the petition should be granted in this case upon any one, or all, of the three following grounds:

1. Petitioner was deprived of due process of law by being required to appear and defend in a court having as its principal executive officer the former leading counsel for respondent; and before a jury in the selection, summoning and impaneling of which the Sheriff was required to act, either individually or through his deputies, amenable only to him, or with the concurrence of other officers.

2. That the action of the Supreme Court of Mississippi in declaring that no judgment should be allowed to stand where the trial had proceeded so far afield from the issues joined, and into wholly collateral matters, that it could not be determined whether or not the verdict was rendered upon the issues joined or upon the collaterals, establish the law of the case, as well as the law of the State of Mississippi; and its subsequent action in affirming the judgment here under review amounted to a denial to petitioner of equal protection of the law.

3. That petitioner has been deprived of due process of law and equal protection of the laws by the cumulative effect of permitting the Sheriff and chief executive officer of the county, who was the former leading counsel for respondent, to participate in every step of the selection, summoning and impaneling of the jury, to allow the trial to proceed into collaterals which included personal animosities between certain of petitioner's witnesses and the Sheriff, and to permit the conduct of the proceedings so that petitioner was made the victim of passion and prejudice.

To fully understand the action of the Supreme Court of Mississippi, it is necessary to consider Sections 286 and 287 of the Constitution of Mississippi (Mississippi Code, 1930, page 138), which are as follows:

> "Section 286. The Supreme Court shall consist of six judges, that is to say, of three judges in addition to the three provided for by section 145 of this Constitution, any four of whom when convened shall form a quorum. The additional judges herein provided for shall be selected one for and from each of the Supreme Court districts in the manner provided by Section 145 of this Constitution, or any amendment thereto. Their term of office shall be as provided by Section 149 of this Constitution, or any amendment thereto.
>
> "Section 287. The Supreme Court shall have power, under such rules and regulations as it may adopt, to sit in two divisions of three judges each, any two of whom when convened shall form a quorum; each division shall have full power to hear and adjudge all causes that may be assigned to it by the court. In event the judges composing any division shall differ as to the judgment to be rendered in any cause, or in event any judge of either division, within a time and in a manner to be fixed by the rules to be adopted by the court, shall certify that in his opinion any decision of any division of the court is in conflict with any prior decision of the court or of any division thereof, the cause shall then be considered and adjudged by the full court or a quorum thereof."

The first two appeals in this case were heard and determined by Division B of the Supreme Court of Mississippi. The third appeal was heard and determined by Division A.

Petitioner does not complain that the laws of the State of Mississippi fail to provide for due process of law to litigants and suitors. It confines its contention to the narrow proposition that, where the officers clothed with the authority of the sovereign state conduct a proceeding devoid of the rudimentary requisites of fair play, and in

violation of the fundamental concepts of justice embodied in the constitutional guaranties of due process of law and equal protection of the laws, these guaranties have been violated. In such cases, the action of the officers clothed with the power and authority of the state is no less state action than if these judgments had been the result of a statutory enactment of its Legislature providing for discrimination and unwarranted action. *Yick-Wo* v. *Hopkins,* 118 U. S. 356. See also *Moore* v. *Dempsey,* 261 U. S. 86; *Brassfield* v. *U. S.*, 272 U. S. 448.

Petitioner does not request this court to review the merits of the trial in the Circuit Court of Lauderdale County, or the considerations which may have influenced the division of Supreme Court hearing the last appeal, although petitioner would welcome such an appraisal. The question here is not whether or not respondent was entitled to recover against petitioner, but whether or not petitioner was accorded the protection and fair treatment guaranteed by the Fourteenth Amendment. In *Tumey* v. *Ohio,* 273 U. S. 510, 535, this court said:

> "It is finally argued that the evidence shows clearly that the defendant was guilty and that he was only fined $100 which was the minimum amount, therefore that he cannot complain of a lack of due process, either in his conviction or in the amount of the judgment. The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge. * * *"

Petitioner denied the charges in respondent's declaration and offered defenses. It contends that due process and equal protection guaranteed to it the right to have these defenses heard and determined by an impartial court, and to have the prevailing principles of law applied to the conduct of the proceedings.

Petitioner feels that this case presents a test as to whether or not the Supreme Court of the United States, in the exercise of the ultimate judicial power of the central

government will pierce the veil of apparent procedural regularity to determine whether or not the fundamental concepts of due process have been observed and equal protection has been afforded. If this court grants the petition and reverses the judgment of the Supreme Court of Mississippi, it will have done no more than Division B of the Supreme Court has done on the two former appeals; that is, to say to Respondent "We do not say you are not entitled to recover, but we do say that, in order to recover, you must not violate the law to obtain your recovery, and you must submit your case in accordance with the fundamental concepts of justice and fair play, and to a court so constituted as to be able to administer the law with equal protection to all."

1.

Sheriff Disqualified.

This court will have observed that, in Mississippi, the Sheriff has all of the muniments of power that traditionally go with the office. In addition to this power, many others, some of which are mentioned in the statutes quoted above, have been specially conferred upon him. It should be observed from the statutes mentioned above, that no step may be taken for the selection, drawing and summoning of jurors without the concurrence of the Sheriff, except in the special cases where he is disqualified and appropriate action is taken upon his disqualification.

The principles controlling in such cases have been so clearly stated by the Supreme Court of Tennessee in the case of *Oliphant* v. *State*, 153 Tenn. 130, 282 S. W. 206, 208, that a quotation from that opinion will best serve the purpose of this argument:

"In 16 R. C. L., Par. 50, p. 233, it is said:

> 'It is a well settled rule, in the absence of a statute, that the right to a fair and impartial jury may not be impaired by the selection or summon-

ing of the jury by an officer who is legally disqualified for the performance of such duty, and, accordingly, it is held that the disqualification of the proper officer necessitates the appointment of a substitute whenever the point is raised by the litigant. This rule is strictly enforced, and the disqualification of the officer is invariably held to be a ground for challenging the panel selected by him, so that the party prejudiced may be given an opportunity to have a jury selected by an impartial officer. It is the duty of the officer who summons jurors, or who selects and summons talesmen, to use his best efforts to secure men of intelligence and good moral character, and in doing this he should act with entire impartiality between the prosecution and the defendant.'

"In 35 C. J., Par. 240, p. 276, it is said:

'It is essential to the fair and impartial administration of justice that the jury should be selected and summoned by officers having no interest in the matters to be tried by it. An officer is not qualified to act in summoning a jury if he is a party to the action, a relative, or an attorney of one of the parties, a relative of deceased in a homicide case, or if he is interested in the event of the action, although not a party of record.'

"To the same effect is *Quinebaug Bank* v. *Tarbox*, 20 Conn. 510; *State* v. *Barber*, 88 Pac. 418, 13 Idaho 65; *People* v. *Felker*, 28 N. W. 83, 61 Mich. 114; *Grisson* v. *State*, 185 Pac. 452, 16 Okla. Cr. 569; *Harjo* v. *U. S.*, 98 Pac. 1021, 1 Okla. Cr. 590, 593, 20 L. R. A (N. S.) 1013; *Patrick* v. *Commonwealth*, 78 S. E. 628, 115 Va. 933.

"In *Koontz* v. *State*, 139 Pac. 842, 10 Okla. Cr. 553, Ann. Cas. 1916A, 689, it is said:

'It is essential to a fair and impartial administration of justice that an open or special venire should be summoned by an officer who is not disqualified by reason of interest, bias, or prejudice.'

"It appears, however, that in Oklahoma there is a statute providing that, when the panel is formed from persons whose names are not drawn as jurors, a challenge may be taken to the panel on account of the bias of any officer who summoned them, which would be a good ground to challenge a juror; such challenge to be made in the same form and determined in the same manner as if made to a juror.

"In *Patrick* v. *Commonwealth, supra,* it was held that the rule of the common law is that no one should take part in the selection of jurors who does not stand indifferent between the parties, and that there is nothing in the Virginia statute which changes this rule.

"In *People* v. *Felker, supra,* it was held that the right of an impartially selected jury is a common-law right, independent of any statute, and, where the summoning officer who selects the jurors is disqualified by reason of interest, is ground for challenge to the array.

"In *Jones* v. *Woodwarth,* 124 N. W. 844, 24 S. D. 583, Ann. Cas. 1912A, 1134, it was said:

> 'To permit the Sheriff under such circumstances to summon the jury where he is a party to an action to be tried by him affords him opportunity to exercise an improper influence over them.'

"[1] It is not, however, necessarily a ground of challenge that the officer who summoned the jury is a witness in that case, unless the statute so provides, or that he is a prosecuting witness. 35 C. J., Par. 240, p. 277.

"[2] If the Sheriff is disqualified to act, the jury should be summoned by the coroner, or by such other disinterested person as the court may appoint, but it is error for the court to appoint one of the Sheriff's deputies to summon the jury. The court may properly appoint an elisor if there is no coroner, or if the coroner is also disqualified. 35 C. J., Par. 241, pp. 277, 278.

"[3] We think the Sheriff and his deputies, by reason of their financial interest in the event of the

instant case, were disqualified to select or summon any of the jurors before whom the defendant was tried. It is highly proper to the fair and impartial administration of justice that the jury shall be selected by officers who are not interested in the event of the case. It is only by a strict observance of this rule that fairness and impartiality in jury trials can be accomplished and maintained. Every reasonable safeguard should be employed to protect juries from improper influence that might not otherwise affect them in their judgment in the trial of cases, both civil and criminal. This is the only way that the integrity of jury trials can be preserved."

As indicated above, there is no dearth of jurisprudence on this point from the Supreme Court of Mississippi. In *Lipscomb* v. *State*, 76 Miss. 223, 244, 25 So. 158, the following appears:

"The main purpose of all proceedings in the selection of juries, the care and control of them during the trial of the cause, and the prevention of improper influences being brought to bear upon them after they are impaneled, is to insure fair and impartial trials of causes, an honest verdict, based upon the real belief of the jurors as produced by the evidence legitimately and properly presented under the direction and control of the court. The main purpose of all trials cannot more effectively be promoted than by the court seeing to it that the duties of the Sheriff are not left to be performed by an interested person or one for other cause incapable or unfit to execute such duties in the particular case to be tried."

In *Ulmer* v. *Pistole*, 115 Miss. 485, 76 So. 522, objection was made that the brother of appellee was the Chancery Clerk of Lauderdale County, and, therefore, Clerk of the Board of Supervisors, and was required to participate in the drawing of the jury along with the Sheriff and Circuit Clerk, as provided by Section 2041 of the Mississippi Code of 1930, quoted *supra*. The court held that the relationship and participation were not such as to disqualify the clerk, but in so doing, it stated the contention of appellants as follows:

"For sound reasons of public policy the appellants should not have been forced to bear any of the possible consequences of this situation, even though no actual fraud was shown to have been committed."

In approving the general principle invoked, the court said:

"This principle contended for by appellants is well established in the common law, and is based upon the old idea that a person should not be placed in a position where there will arise a conflict between interest and integrity; that the temptation to do wrong should not be afforded by opportunity for fraud. We do not dispute the soundness of this view, and in proper cases the application of this principle should be made, but the case before us does not come fairly within this rule."

The frailties of the jury system were recently adverted to by this court in an opinion which, while not unanimous as to the result, appears to have expressed the views of all of the justices participating. This court has shown that if the advantages and safeguards of the jury system are to be preserved, it is necessary that its delicate mechanism be kept in proper alignment. In the case of *Glasser* v. *United States*, 315 U. S. 60, 85, the following appears:

"Jurors in a Federal Court are to have the qualifications of those in the highest court of the state, and they are to be selected by the clerk of the court and a jury commissioner. * * * This duty of selection may not be delegated * * * and, its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing Federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept

of the jury as a cross section of the community. Tendencies, no matter how slight, toward the selection of juries by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trials, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties."

The question was properly raised by motion to quash the panel. This was implicit in the holding in *Lipscomb* v. *State, (supra)* 76 Miss. 223, 25 So. 158; and in the holding of the Supreme Court of Mississippi on the second appeal of this case, *J. W. Sanders Cotton Mill, Inc.*, v. *Moody,* 191 Miss. 604, 2 So. 2d 815, wherein the court said:

> "The question was properly raised in the court below by motion to quash the panel before the trial, and on motion for a new trial."

The question was also raised by the motion for new trial (R. 519-22).

2.

Excursions into Collaterals.

As stated above, petitioner does not contend that this court should retry this case on the merits. What petitioner does contend for is that this court should examine the record in this case, and the law of the State of Mississippi, and determine whether or not that law has been so applied as to deprive petitioner of its property without due process, and to deny to it equal protection of the laws. This court has recently affirmed the supremacy of the highest court of the state in the matter of interpreting and announcing the substantive law in all matters reserved to the state and not occupied by the central government in the exercise of its constitutional powers. It is axiomatic

that while due process contemplates certain minimum standards of procedure, the guaranties are substantive in their qualitative effect. The line of demarcation between substantive and procedural considerations are sometimes elusive to the professional, and are a hollow mockery to the litigant when his rights are made to turn upon them.

However, in the present case, it so happens that without regard to whether the question here presented be considered procedural or substantive, the last words on the question of how far a trial may be allowed to proceed into collaterals in the State of Mississippi, was uttered in the opinion rendered on the first appeal. In *J. W. Sanders Cotton Mill, Inc.*, v. *Moody*, 195 So. 683, at 688, the court said:

> "Over repeated objections by appellant, the court permitted appellee to impress the jury with witnesses produced by her who affirmed that, going back over a period of more than three years and to all parts of the mill, where these machines in a large number were in operation, clearer boards were often split or had holes bored in them; that some of them were homemade out of improper material; and that the nebs or latches were often broken off and missing in various parts of the mill, so that the clearer boards would fall off and thus be around the feet of the workers; that these would not be remedied or repaired and that those whose duty it was to repair would often fail to do and would give as an excuse that there was nothing at hand for the making of the repairs. In other words, that because some, or even many, clearer boards, separate and independent of each other, throughout a considerable length of time and throughout several parts of the mill, were defective or unsuitable, or for the same length of time nebs or latches were broken off or missing, then the particular board in this case at this particular time was unsuitable and this particular latch was at this particular time in some way defective. If such evidence were probative, then it could be said to be proof enough, when a person is in a town where there are

a number of merchants and meets a man on the street, that the man so met is a merchant. All the above was denied by every witness for defendant, but in view of the verdict these denials disappear.

"Appellee seeks to defend this testimony on the strength of such cases as *Crawford* v. *City of Meridian, Miss.*, 154 So. 888. In the cited case it was held that evidence of several previous accidents at the same point in the street is admissible. But there is no authority in that case that previous accidents happening throughout the municipality and at various points therein would be admissible. A case more nearly in point with what we have here is *Wilson & Co.* v. *Holmes*, 180 Miss. 361, 368, 177 So. 24; but we cannot prolong discussion of this question in an opinion already lengthy, and we, therefore, say here only that none of our cases, where the point is made, permit testimony to go so far into collaterals as was done in this case. Whatever may be the specific limitations as regards relevancy, there must always be the ultimate limitation that the testimony shall never run to such length in such matters as to raise a doubt whether the case was decided by the jury on the real issue or whether on the collaterals."

Petitioner submits that when the foregoing principles are applied to the record in this case, the judgment of the Circuit Court of Lauderdale County should have been reversed. The failure of the Supreme Court of Mississippi to reverse the judgment, without modifying the principle of law involved, amounts to a denial to petitioner of the protection of the law of this state.

3.

Cumulative Effect of Improperly Organized Courts and Excursions into Collaterals.

Attention has already been called to the improper conduct of counsel in making side remarks to the jury, such as was committed in the case of *Trott* v. *McDonough*, now pending on the docket of this court. Reference has

also been made to improper statements made in the guise of questions propounded on cross-examination. More important was the grilling of various witnesses produced by petitioner, in an effort to show personal animosity between them and Sheriff Ross. Of these matters, the Supreme Court of Mississippi has said (*J. W. Sanders Cotton Mill* v. *Moody, supra,* 195 So. 683, 688):

> "In view of the general attitude of this record there are several other instances which occurred in the taking of the testimony which cannot escape the attention of an examiner who would responsibly grasp its import, and wherein collateral matters were unduly pursued. For instance, in the cross-examination of the witness, Anders, the spinner foreman of the mill. It may be that the methods of this mill in that it had no concern whatever as to the welfare or safety of its workers; that it engaged in the indirect subornation of witnesses; that its harsh course of work might be described as the stretch-out system, about which this witness was taken so severely in hand on cross-examination, may, if true, have made this concern an undesirable member of the community; but there is too much danger in allowing examinations to go to such lengths that the particular merits may be obscured and that passion may be aroused by these extraneous considerations. As already otherwise stated, and under whatever principle it may be that evidence is adducible, and even on cross-examination touching the bias or interest of witnesses, it should never be permitted to proceed so far into collaterals as to raise a doubt whether the verdict is upon the real issues or whether upon general principles that the plaintiff or the defendant, one or the other, is by his general character or conduct deserving of a verdict against him, be the precise facts what they may. The attitude of this court on this subject is illustrated by what was said in *Jones* v. *State,* 159 Miss. 119, 131 So. 826.
>
> "And what was said in the case last cited bears upon the contention made here that the defendant did not at all times and in every place object to the

irrelevant testimony. Defendant shows that it made 138 separate objections, nearly all of which were overruled, whereas, most of them were so obviously well taken that it is difficult to see why they were not unhesitatingly sustained."

The undue prominence given to Sheriff Ross in this trial cannot be over emphasized. The first contact the members of the jury had with the court was when they were served with subpoenas by the Sheriff or his deputy. He had already been present when their names were placed upon the jury list. The names could not be placed in the jury box without his concurrence. No lawful drawing could be made except with his participation. Their attendance upon the court, their qualification, and their very presence in the court room was under the control and supervision of the Sheriff.

The action of the trial court in displacing the Sheriff and requiring the coroner to perform the duties of the office in connection with this trial, was in recognition of his bias and interest (R. 42-5). However, this action accentuated in the jury's minds that the Sheriff was a person in interest in the trial of the case, or that this was the case in which the Sheriff was interested. Moreover, the Sheriff continued in charge of the Court House and the premises belonging thereto, and presumably guarded the same from trespassers and intruders, as provided by Section 3331 of the Mississippi Code of 1930 quoted *supra*. Insofar as the juries were concerned, the damage had already been done, and nothing short of quashing the panel could have afforded petitioner the fair trial guaranteed to it. But the matter was not allowed to rest there. Witness the effort made to show the animosity existing between Dr. Klein, petitioner's witness, and the Sheriff (R. 359-70, 378, 440-1, 445). Notwithstanding what the Supreme Court of Mississippi had said with reference to the handling of the witness Anders on the first trial, notice the pitting of Anders against Ross, as shown by the

Record, at pages 340-1, 464, 482-5. See also Record pages 453-4.

As if this was not enough prejudice, Sheriff Ross was made a witness for Respondent to establish her case in chief (R. 208-13), and gave long, graphic, argumentative statements in answer to leading question designed to supply important details in the development of the case in chief. Thereafter, he was recalled to the witness stand on two occasions (R. 445, 465, 482-5). In fact, any juror returning a verdict for petitioner, if he had been personally acquainted with Sheriff Ross (and it must be remembered that all were subpoenaed through the Sheriff's office), would have felt constrained to apologize to him after the conclusion of the trial.

As already pointed out, full benefit was taken of this situation by counsel for Respondent in his argument to the jury. Such argument has been condemned by the Supreme Court of Mississippi in the following cases: *Mars* v. *Hendon*, 178 Miss. 157, 171 So. 880; *Mississippi Power Co.* v. *Stribling*, 3 So. 2d 807, 191 Miss. 832; *Newman Lbr. Co.* v. *Norris*, 130 Miss. 751, 94 So. 81; *Martin* v. *State*, 63 Miss. 505; *Herrin* v. *Daly*, 80 Miss. 340, 31 So. 790; *N. O. & N. E.* v. *Jackson*, 105 So. 770, 140 Miss. 375. Similar condemnation has been pronounced by this court in *New York Central* v. *Johnson*, 279 U. S. 310, and *Brassfield* v. *United States*, 272 U. S. 448.

The errors complained of are not errors of procedure, but are such as run counter to the fundamental concepts of justice which lie at the base of civil and political institutions in the United States, and offend against the constitutional inhibitions upon which petitioner relies. *Snyder* v. *Massachusetts*, 291 U. S. 97; *Powell* v. *Alabama*, 287 U. S. 45; *Norris* v. *Alabama*, 294 U. S. 587; *Mooney* v. *Holohan*, 294 U. S. 103; *Brown* v. *Miss.*, 297 U. S. 278; and see also *Morgan* v. *U. S.*, 298 U. S. 468, 304 U. S. 1.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

J. W. Sanders Cotton Mill, Inc.,
By BEN F. CAMERON,
Attorney for J. W. Sanders Cotton Mill, Inc., Petitioner.

APPENDIX A.

Memorandum from Supreme Court of Mississippi for Additional Briefs.

IN THE SUPREME COURT OF MISSISSIPPI.

No. 33,989.

J. W. Sanders Cotton Mill vs. Lula Moody. Division A: *Per Curiam.*

MEMO. FOR ADDITIONAL BRIEFS.

The record in this case, every page of it, has been carefully read and parts of it in conference. The briefs have been read more than once. The examination, so far made, has left the impression that a considerable part of that brought out by plaintiff either on direct or on cross-examination had no substantial relevancy to the precise issues which should have been tried by the court and to which the evidence should have been confined; namely (1), had the employer neglected to use reasonable care to make the machine reasonably safe in respect to the clearer board and in the particular respect specified in the declaration and in appellee's own testimony, she being admittedly the only person who saw the accident, and was such particular negligence, if any, the proximate or a proximately contributing cause of an injury to plaintiff, as one likely to happen; and (2) the true extent of the injury or injuries thereby caused, not including those caused by or resulting from something else, if anything else.

We shall not undertake to group or classify what seems to us at the present time to be irrelevant testimony; but it would seem that it might be grouped under about four classifications, only one of which we shall here mention. It seems to us, for instance, that the testimony repeated

again and again in various forms about the long hours of labor, and the constant activity required in those hours had no place as respect the true issues above stated, and, as at present advised, it seems to us that the climax of the incompetency and harmful irrelevancy was reached in the examination on pp. 295, 296 about the so-called stretch-out system.

The pages just cited are selected for the further purpose of calling attention to the fact that at that particular point no objection was made by the defendant. But the rule is that if the principle involved on an objection to evidence be once decided against a party, he will not be required to object when thereafter evidence involving the same principle is again brought forth. *Herrin* v. *Daly*, 80 Miss. at p. 340. Had not the defendant sufficiently raised the objection at a previous point or points in the record? If so, precisely on what page or pages of the record? And so on throughout.

Counsel for appellant has not attempted to group or classify the testimony claimed by him to be incompetent, and has not pointed out all the pages in the record where such incompetent testimony as grouped appears; and if incompetent testimony has been repeated without an objection interposed at that particular point, he has not shown where at a preceding page or pages the objection presenting the principle involved was made, if any such preceding objection was made.

Counsel for appellant labors under the impression, as disclosed by the closing expression in his principal brief, that he was due an apology to the Court for a brief of 44 pages, while counsel for appellee has, without apology, presented a brief of 124 pages, every page of which is welcomed by the Court. We have endeavored in various ways to make it known to the bar of the State that we do not object to long briefs, but, on the contrary, insist on them when necessary to a presentation of all the contentions of counsel which he deems material to his case.

We have repeatedly called for additional briefs that this may be understood; and we are doing so now in this case.

All will agree that it is the constitutional duty of courts to see that all litigants, whether plaintiffs or or defendants, are given what may be designated under the general term fair trials. If incompetent or irrelevant testimony is admitted, the effect of which is to lead the jury away from the real issues and to prejudice them against one or the other party, then this question is the first to which the court should look because every case must be so tried that the jury shall be fair and impartial not only at the beginning, but must be allowed to remain so even to the end.

An additional and full brief is requested from appellant on the questions of incompetent, irrelevant or immaterial testimony in this case,- keeping in mind that the Court has not decided but only has an impression that there is such testimony of a harmful nature in this case, which if established under the law is cumulative in its effect, to which appellee is to have full opportunity to reply in defense of all or any part of such testimony.

It is requested that appellant file its brief confined to questions stated herein, on or before three weeks from this date, to which appellee will reply in two weeks thereafter, and appellant a rejoinder in one week. Counsel may extend the time by agreement, save that we would prefer that the briefs be all completed not later than May 4 next, in view of our approaching adjournment on or about June 10th.

Issued this March 7, 1940.

(If counsel should extend the time by agreement as allowed under the foregoing concluding paragraph, it ought to be in writing, filed with the Supreme Court Clerk.)

APPENDIX B.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942

No. .....

THOMAS HENRY TROTT, PETITIONER

vs.

McDONOUGH MOTOR EXPRESS COMPANY, INC., A CORPORATION, ET AL, RESPONDENTS

Brief and Argument in Support of Petition for Certiorari.

HORACE C. WILKINSON
Counsel for Petitioner

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Points of Law.

A

Procedural due process is not satisfied though the result is just if the hearing was unfair.

Powell v. *Alabama*, 287 U. S. 45
Moore v. *Dempsey*, 261 U. S. 86
Frank v. *Mangrum*, 237 U. S. 309
Snyder v. *Mass.*, 291 U. S. 137

B

The public interest in a trial requires the trial court to protect suitors in their right to a verdict uninfluenced by appeals of counsel to passion or prejudice.

London Guarantee & Accident Co. v. *Woelfle*, 83 Fed. (2d) 325.
Brasfield v. *U. S.* 272 U. S. 310
N. Y. C. RR Co. v. *Johnson*, 279 U. S. 310
Blair v. *U. S.* 241 Fed. 217
Pettine v. *New Mexico*, 201 Fed. 489.
Berger v. *U. S.* 295 U. S. 78
Pearce v. *U. S.* 86 Fed. (2d) 949

C

It was unfair and prejudicial to get before the jury the fact that petitioner's employer was insured and that the insurance carrier made a settlement of the claim for damage to the McDonough truck.

Standridge v. *Martin*, 203 Ala. 486
Kelly v. *State*, 113 Miss. 856

May it Please the Court:

We think this case is squarely within the rule stated by Mr. Justice Roberts in his dissent in *Snyder* v. *Mass.*, 291 U. S. 137, where it is said:

> "Where the conduct of a trial is involved, the guarantee of the Fourteenth Amendment is not that

a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way."

* * * * * * *

"Procedural due process . . . is not satisfied, though the result is just if the hearing was unfair."

We do not understand that the majority opinion disagreed with Mr. Justice Roberts in the statement of the rule. The difference between the majority and minority was in the application of the rule. In fact as we read the cases the rule has been approved by this court in

Powell v. *Alabama*, 287 U. S. 45.
Moore v. *Dempsey*, 261 U. S. 86.
Frank v. *Mangrum*, 237 U. S. 309.

True, the cases cited were criminal cases, but the nature of the case does not militate against the principle. A party plaintiff or defendant in a civil case is entitled to a fair trial and if he is denied one his constitutional rights have been infringed. The reason is that a trial in court is never a purely private controversy of no importance to the public. The State whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted, and that the verdict of the jury be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by appeals of counsel to passion or prejudice. Where such paramount considerations are involved the failure of counsel to particularize an exception will not preclude an appellate court from correcting the error.

Brasfield vs. *U. S.* 272 U. S. 484.
N. Y. C. RR Co. v. *Johnson*, 279 U. S. 310.

Judge Sanborn in speaking for the Circuit Court of Appeals in *London Guarantee & Accident Co.* v. *Woelfle*, 83 Fed. (2d) 325, at page 340, expressed the idea we are attempting to present in this way:

"Under our system of jurisprudence it is the province of the jury in actions at law to try and determine the rights of parties according to the law and the evidence. It is the duty of the court and of its officers, the counsel of the parties, to prevent the jury from the consideration of extraneous issues, of irrelevant evidence, and of erroneous views of the law, to guard it against the influence of passion and prejudice, and to assure to the litigants a fair and impartial trial. An omission by court or counsel to discharge this duty, or a persistent violation of it, is a fatal error, because it makes the trial unfair. * * * A trial is not fair and impartial in which a discussion of irrelevant issues, a statement of a persuasive but immaterial fact, or the assertion or insinuation of an erroneous view of the law or of the wrong measure of damages by counsel in his address to the jury, may have had an influence favorable to his client. The trial judge has the power, and in the first instance it is his duty, in the absence of objections by opposing attorneys, to stop and reprimand an attorney who undertakes to indulge in remarks of this nature, and, if possible, to immediately extract from the trial the vice of his obnoxious observations. And if, as is often the case, it is impossible to accomplish this, it is the duty of the court to at once discharge the jury and to direct a new trial. This is primarily the duty of the judge because the conduct of the trial and the task of making it fair and impartial are chiefly intrusted to him, and because it is a delicate and irksome duty for a lawyer to interrupt and censure his opponent in the midst of his argument, a duty from the discharge of which the court should as far as possible relieve him."

We are confident this Court will appreciate the radical departure from the rules of fair play that made it impossible for Trott to have a fair consideration of his case by a jury that had been designedly poisoned to the hilt.

The McDonough Company started out with a flat charge to the jury that Trott recognized that he was negligent and that his negligence caused the damage to the McDonough Company's truck and that he paid the Mc-

Donough Company for the damage to its truck because he recognized that he was responsible for the accident. The McDonough Company must have known that the charge was not true when it was made in the supplemental notice. We say that because:

(1) There is not a scintilla of evidence in the record to support the charge.

(2) The undisputed and unchallenged evidence which was more available to the McDonough Company than it was to Trott, expressly and conclusively refutes the charge.

By this maneuver and under the guise of making good the charge the McDonough Company was able to get before the jury the fact that Trott's employer was insured; that the insurance carrier of Trott's employer had made a settlement of the McDonough Company's claim for damage to its truck; that the insurance carrier of Trott's employer was paying Trott the small sum of $11.70 per week as compensation under the Alabama Compensation Law; that some one paid $500.00 on Trott's hospital bill. All of which were highly prejudicial.

In addition to all of that the evidence showed that the McDonough Motor Company was acquainted with the particulars under which the settlement by the insurance carrier was made, and that Trott was in no way concerned in the said settlement and had no notice of or knowledge of its having been made. He was never consulted about it and neither was his employer. Under such circumstances, we submit, it is impossible for the Court to reach the conclusion that the claim and plea was interposed in good faith. It was advanced, not for the purpose of proving that Trott paid the McDonough Company anything or that he was concerned in any payment to it, but for the purpose of injecting a lot of prejudicial matter into the case under the pretense or guise of attempting to support the plea.

It has been repeatedly ruled by the State courts that it is prejudicial error to get before the jury the fact that a defendant in a personal injury case is insured or that an insurance company is participating in a defense.

Standridge v. *Martin,* 203 Ala. 486.
Kelly v. *State,* 113 Miss. 856.

The same reasoning seems to us to compel the conclusion that it is highly improper for a defendant to get the fact before a jury that a truck driver's employer was insured and the insurance company made a settlement of the case. It would be an impeachment of the legal learning of counsel for defendants to intimate that they did not know that it would be highly improper and reversible error to get the fact that a settlement had been made before the jury unless they could connect Trott with it.

The right to a verdict upon the law and the evidence uninfluenced by extraneous matters is not a mere personal privilege of the litigant but is so interwoven with the public interest that any consent to its violation implied for failure to make proper objection, exception, request for motions in the trial court, does not preclude the protection of that right by the Federal Appellate Court.

N. Y. C. RR Co. v. *Johnson,* 279 U. S. 310.
Blair v. *U. S.* 241 Fed. 217.
Pettine v. *New Mexico,* 201 Fed. 489.

However the Court is not troubled with that question in this case because adequate objection was made, exceptions taken and adequate appeal for redress was made to the trial court, and denied.

The foregoing violation of the fundamental rules of fair play by filing a fake plea that the McDonough Company had no reasonable expectation of proving, was followed by a statement made in open court by its counsel in the presence of the jury, that plaintiff's brother and his employer were sponsoring this law suit in an effort to "unload on this Meridian concern" and get out of pay-

ing compensation to Trott. (Record pp. 228, 229, 306) This statement is wholly unsupported by the evidence. The McDonough Motor Company developed that the Southern Motor Express insured its compensation liability with the Maryland Casualty Company as it was authorized by the law of Alabama to do. The premium on its insurance was based on liability not on what the insurance carrier had to pay. It did not matter a farthing to the Southern Motor Express how much compensation the insurance carrier paid Trott, or whether it paid him anything. The Southern Motor Express washed its hands of the matter entirely when it insured its liability as it was authorized by the Alabama Law to do; and yet Trott's case went to the jury with the statement of influential local counsel on whom the jury had a right to rely that Trott's employer was sponsoring the law suit in an effort to unload on the Meridian concern, meaning the McDonough Motor Company.

Not content with having charged before the jury that Trott had settled with the McDonough Motor Company for the damage to its truck because Trott was conscious that his negligence caused the accident, and that Trott's employer was sponsoring Trott's case in order to unload on this Meridian concern and get out of paying Trott compensation, statements wholly unsupported by any evidence, counsel for the McDonough Motor Company stated in the presence of the jury, that Trott who was claiming and endeavoring to recover a hospital bill of $4,255.00 (Record 327-331) was entitled to have his hospital bill paid without a suit from a fund in Alabama. Counsel then emphasized that statement by stating in the presence of the jury:

> "There is no law in the world whereby a man may collect twice for the same injury."
> (Record, page 307)

And when counsel for Trott arose to expose the falsity of that statement, counsel for the McDonough Company interrupted and said, "We now request that the jury go out."

(Record 307) And the jury retired over plaintiff's objection, (Record 307), without an opportunity for Trott to demonstrate the falsity of that statement. Having injected the maximum amount of poison and prejudice into the case the McDonough Company was diligent in seeing that Trott was afforded no opportunity to in any way counteract or correct the impression the jury received.

Lest it be thought we are overdrawing the picture let the record itself picture the peculiar viciousness of this prejudicial event:

Mrs. Trott, the wife of the plaintiff, was on the stand. On cross-examination by defendants, beginning on page 304 of the record we find the following occurred:

"Cross Examination

By Mr. Snow: (Counsel for McDonough Company)

Q. Mrs. Trott, Mr. Trott receives compensation under the laws of Alabama, does he not?

A. He receives a compensation check.

Q. And he is also entitled under the laws of Alabama to medical treatment, is he not?

A. To do what?

* * * * * * *

Q. Is he not entitled as a part of his compensation to have additional sums with which to pay hospital bills and doctors' bills?

By Mr. B. F. Cameron: (Counsel for Plaintiff)

We object to these questions about compensation if the Court please. There is no pleading of any sort about that, and it has no part in this case. We object to it.

* * * * * * *

By Mr. Snow:

Q. This compensation that you have comes through the Southern Motor Express, your husband's employer, does it not, Mrs. Trott?

A. Now, I don't know anything about this compensation check. All I know, it comes from Atlanta.

By Mr. Snow:

Q. Now as a part of that, and in addition to the weekly stipulation or amount which he gets, there is a medical fund, is there not ma'm?

By Mr. C. B. Cameron: (Counsel for Plaintiff)

We object to that if the Court please, for the reason that any compensation that this young man receives under the law of Alabama is not in bar of any right to his recovery of physical pain and expense from his injury under the law.

By Mr. Snow:

You will recall on yesterday that Mr. Trott was asked in regard to the Southern Motor Express sponsoring this lawsuit to get out of the payments themselves. Now then, this is simply following that up. We have a right to show, when they ask these defendants to compensate them, we have a right to show that he is paid from a fund that he doesn't have to sue for, that is provided through his employer, as compensation to an injured employee, with which to pay this money.

By Mr. C. B. Cameron:

In response to that, we say if the Court please, that the allowance of workmen's compensation in Alabama to this young man for his injuries is not in bar of any right that he has to collect from this defendant for its negligence for his injuries, and doctors' and hospital bills.

By Mr. Snow:

Before your Honor rules, may I make this observation. *There is no law in the world whereby a man may collect twice for the same injury.*

By Mr. Wilkinson: (Counsel for Trott)

If the Court please -

By Mr. Snow: (Interposing)

We now request that the jury go out.

By Mr. C. B. Cameron:

To that we object.

By the Court:

Let the jury go to the room. The Court requests that the jury go to the room.

(At this point the jury retire from the hearing of the Court and the following proceedings were held in the absence of and out of the hearing of the jury:)

* * * * * * *

By Mr. B. F. Cameron:

I want to say this, if the Court please, counsel has made a statement here in the presence of the jury that this man is entitled to have his hospital bill paid without suit. Now that isn't true, and isn't within a thousand miles of the truth. I think the only fair thing would be to put counsel on the stand or have him retract the statement before the jury, or have your Honor to make some appropriate statement.

* * * * * * *

Here is why I wanted the jury to go out. I think, gentlemen, *this doctor's bill has gotten before the jury where it isn't right. There ought to be some explanation made of it.* I say that to both sides. These statements that you lawyers are making that the doctor's bill is to be paid, if that is true, all right; if it isn't true, the jury ought to know it.

By Mr. Wilkinson:

It isn't true.

By the Court:

And let's quit making those statements, gentlemen. The lawyers, all of you, know that that isn't competent to state those things before a jury, and let's try this case like a lawsuit.

* * * * * * *

By Mr. Wilkinson:

May I read this statute to your Honor, Section 7567 of the Code of Alabama? (Section 7567 read.)

By Mr. B. F. Cameron:

I say that the statement has been made by counsel in the presence of the jury that there is a fund by which this man can have his doctor's bill paid without a lawsuit. Now the jury has that, and thereupon the jury retired, and we have some proceedings here, and that it is unchallenged. That jury

can never get that out of its mind. Now that is not the truth. The statement was made and objected to, but it is in the record before the jury, and it is utterly poison, and some way ought to be found within the realm or precedure to correct it, but I don't know how it can be done.

But I ask counsel - $500.00 has been paid and is shown on here. As far as we know that is all in the world that can ever be paid, and I have asked counsel here if he will correct that impression. I am sure he wants to be fair about the thing, and I do think some statement ought to be made by your Honor or by counsel that will disabuse the jury's mind as to that, because here is a bill that runs to over four thousand dollars.

By the Court:

You mean $500.00 has been paid?

By Mr. Cameron:

Has been paid.

By the Court:

And it leaves that much?

By Mr. Cameron:

$4,255.00.

By the Court:

After that has been paid?

By Mr. Cameron:

Yes, here is the itemized statement.

By the Court:

I am sure the attorneys on the other side want to be perfectly honest about it. *That is why I let the jury go to the room to decide some way to correct that error between you lawyers by agreement, if you can.*

* * * * * * *

By Mr. C. B. Cameron:

We want the statement retracted that counsel made in the presence of the jury.

By Mr. Wilkinson:

I suggest the Court has the right to state to the Jury he has consulted the Alabama Statute, and the Alabama statute provides a hundred dollars and no more.

By the Court:

I don't think the Court has that right in this state. If I did it and you got a verdict, it would be reversed. I think though that you attorneys have a right to explain it.

* * * * * * *

By Mr. B. F. Cameron:

** * * Still, that will not cure the fact that counsel states definitely that there is a way to get this without suit, and leaving the very clear impression with the jury that this is a put up job here to make somebody else pay when there is an easy way to get it.*

* * * * * * *

By Mr. B. F. Cameron:

I don't know any way it will be handled unless counsel will voluntarily correct the statement.

By the Court:

I don't either. You are big enough lawyers to correct this thing.

* * * * * * *

(At this point the jury return into open court, and the following proceedings were had in the presence of and within the hearing of the jury:)

By Mr. Snow:

Q. Mrs. Trott, there has been five hundred dollars paid to the hospital by the people who pay the compensation, already, has it not been?

A. Well, there is $500.00 been paid, but who paid it I do not know.

Q. You don't know who paid it?

A. No, I don't.

Q. But you do know that neither you nor Mr. Trott paid it?

A. That's right."

When the trial court would not protect Trott he was forced, in an effort to protect himself, to put a witness on the stand to testify to facts contrary to the statement made by counsel in the presence of the jury. The McDonough Company in that way injected a false issue into the case

and the trial court kept that issue in it, and left it to the jury to accept or reject the statement of the witness as they saw fit, although counsel who made the false statement was not sworn or allowed to be cross-examined by Trott.

It was, of course, highly improper to state that Trott could get his hospital bill in Alabama without suit when such was not the case, particularly in view of the fact that Trott was attempting to recover a hospital bill in excess of four thousand dollars. It was a charge that Trott was perpetrating a fraud. It was a charge that Trott was not dealing fairly but was attempting to impose upon the McDonough Company. It was a charge that Trott would not voluntarily accept money from an alleged fund with which to settle his hospital bill, but preferred to collect it from the McDonough Company by law suit. The jury understood that. They had a right to accept as true the statement of influential local counsel to that effect. This is not a case in which there was an inadvertent overstepping of rules. It is a case in which there were multiple transgressions that could not be condoned if every Court in Christendom held that the McDonough Motor Company was entitled to a directed verdict, which obviously it was not. It is not a case where the conduct was slight or confined to a single incident, but one where the misconduct was pronounced and persistent with a probably cumulative effect upon the jury, and so diabolical that even the trial court admitted its inability to deal with it. In *Pearce* v. *United States,* 86 Fed. (2d) 949:

> "Indulgence was designed rather than inadvertent, and an improper purpose its only explanation. That it was intended to prejudice the jury is sufficient ground for a conclusion that in fact it did so. * * * Above and beyond all technical procedural rules designed to preserve the rights of litigants, is the public interest in the maintenance of the nation's courts as

> fair and impartial forums where neither bias nor prejudice rules, and appeals to passion find no place, though the government itself be there a litigant.

To like effect is *Berger* v. *United States*, 295 U. S. 78.

The prime reason why a judgment obtained by the misconduct of counsel in stating and commenting on facts not in evidence and not deducible from the evidence in the case, must be set aside, is that the misconduct deprives the defeated litigant of that fair and impartial trial to which of right every litigant is entitled. We take it it requires no citation of authorities to convince this court that a trial is not fair in a legal sense when counsel makes statements to the jury of matters or facts not testified to by any witness and neither admitted nor admissible in evidence. This for the reason that it is not only giving testimony unsanctioned by an oath, but testimony not subject to the test of cross-examination, and testimony which the aggrieved litigant has but little, if any, opportunity to refute by contradictory or explanatory proof.

The record in this case very clearly shows that the McDonough Company was willing to go to any lengths, take any chance, in order to gain a verdict in what it believed was a dangerous case. It tried the case on the theory of winning the initial round by fair means or foul, on the theory that the pauperized plaintiff would probably be unable to get his case before an appellate court, and strange to say, the Supreme Court of the State of Mississippi approved the procedure of getting a verdict by fair means or foul and solemnly refused to interfere, because it was of the opinion - contrary to the opinion of the minority of the jury who saw and heard the witnesses in the case - that the verdict of the majority of the jury on the merits was correct.

We respectfully ask this court to grant the writ of certiorari in this case and to put litigants, the profession and the lower courts on notice that a litigant will not be permitted to enjoy a victory won at any expense and by unconstitutional procedure.

Respectfully submitted,

HORACE C. WILKINSON,
Counsel for Petitioner.

(29)

FILED
MAY 22 1943
CHARLES ELMORE CROP
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1942, TERM

No. 905

J. W. SANDERS COTTON MILL, Inc.,
PETITIONER
vs.
LULA MOODY, RESPONDENT

BRIEF FOR RESPONDENT LULA MOODY, IN OPPOSITION

MARION W. REILY,
Attorney for Respondent

M. V. B. MILLER,
Of Counsel

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IN THE

SUPREME COURT OF THE UNITED SATES

OCTOBER TERM, 1942

J. W. Sanders Cotton Mill, Inc., Petitioner

vs.

LULA MOODY, Respondent

JURISDICTION

Grounds upon which the jurisdiction of this Court is invoked is Section 240 of the Judicial Code as amended by Acts of February ,1925, subsections A and B separately and severally, 28 U.S.C.A. 347, and also Rule XXXVIII of the Revised Rules of the Supreme Court of the United States adopted February 13, 1939.

STATEMENT OF CASE

On November 29, 1938, Respondent Moody filed a declaration in the Circuit Court of Lauderdale County, Mississippi, against Petitioner J. W. Sanders Cotton Mill, Inc., charging in general terms the petitioner, by whom she was employed as a spinner, negligently failed to keep its machinery in repair to the hurt of respondent in the sum of $22,000. The pleas of the petitioner denied all negligence charged, denied that respondent was even injured in said mill.

Trial was had in April 1939. Judgment was recovered by respondent for $7,000 against petitioner. Thereupon petitioner appealed to the Supreme Court of Mississippi. On considering the appeal, quite a lengthy opinion was

written by the Court reversing the cause and remanding it for a new trial. See *J. W. Sanders Cotton Mill v. Moody*, 189 Miss. 284, 195 So. 683.

In the course of the opinion the Court pointed out that the declaration was in general terms. No bill of particulars was furnished and from the range of the testimony, the instruction on liability it was impossible to tell whether general defects of all the machinery or a particular defect of a particular machine was relied on for a recovery; that also the instruction on liability was errorneous; that both respondent and petitioner went too far into collaterals; that the record on a retrial of the cause should not be cluttered up with defenses having no place in the case. The declaration was amended to specifically charge injury was caused by a defect in a particular unit of a machine.

A retrial was had in conformity with the opinion rendered on the first appeal. Again the jury found for respondent in the sum of $7,000.00 From this judgment again petitioner appealed to the Supreme Court of Mississippi. Again the Supreme Court reversed the case, this time on a point in no way involved in the first appeal. See *J. W. Sanders Cotton Mill v. Moody*, 190 Miss. 604, 2 So. 2d 815.

The third trial was had in conformity with the Court's opinion in its decision of the second appeal of this cause. A verdict of $8,000.00 was had by respondent against petitioner. From this judgment petitioner appealed, but as there was nothing in this appeal that had not been decided adversely to petitioner on the second appeal, the Mississippi Supreme Court affirmed this cause without writing

an opinion thereon. *J. W. Sanders Cotton Mill v. Moody*, 110 So. 2d 544.

A suggestion of Error was filed by Petitioner, J. W. Sanders Cotton Mill, Inc., attacking the affirmance of the case by the Supreme Court of Mississippi. This Suggestion of Error was overruled.

The case has now been brought to this Court upon Petition for Certiorari upon the contention that the State Supreme Court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

ARGUMENT

(a) Due Process

Petitioner contends that it has been denied due process. The most frequent definition of due process is a right of notice before being proceeded against and an opportunity to defend the action.

There were three trials of the cause involved here in the Circuit Court of Lauderdale County, Mississippi; three appeals to the Mississippi Supreme Court by petitioner from adverse judgments and also a suggestion of error was filed before the Mississippi Supreme Court by petitioner and overruled. This cause originated nearly five years ago and has been constantly litigated since.

The right to be heard does not mean that such right

in one cause shall go on forever like Tennyson's brook. Under the admitted history of this cause, only unusual and startling conditions would justify further consideration of this cause, and such are entirely lacking in it. This is an ordinary personal injury suit with no unusual features.

Petitioner contends the overruling of its motion to quash the jury panel in the Circuit Court of Lauderdale County was a denial to it of due process. The motion is found on pages 9 and 10 of the record. Petitioner offered no evidence in support of the motion, *Glasser v. United States*, 315 U. S. 85. Respondent offered evidence thereon, and it clearly showed there was no merit to the motion. The trial court very properly held: "There is certainly no semblance of anything irregular that has been proven in this motion."

"There are a lot of charges, but nothing has been proven in this motion." "There are a lot of charges, but nothing has been proven." R. 26.

The following is from page 27 of the record:

"By Mr. Miller: I will ask the Court to pass on this charge specifically, whether it is sustained by the proof that the sheriff has a financial interest in this case.

"By the Court: From the facts the Court finds that he has not. It has been positively sworn by the sheriff that he has no financial interest whatever, and counsel for the plaintiff testifies that he has no financial interest in it. There is no testimony that he has." R. 27.

Petitioner relies largely on and quotes extensively from *Oliphant v. State*, 153 Tenn. 130, 282 S.W. 206.

In that case is also found:

"Upon a verdict of guilty he was fined $100 and given a sentence of 60 days in the county jail. * * * *

"The record further discloses it was the practice of the sheriff and his deputies in Dickson County to divide one-half the fines so appropriated to the sheriff and collected in cases involving a violation of the prohibition laws under this resolution.

"The record further discloses that at the October term, 1925, of the Quarterly County Court of Dickson County that Court appointed twelve jurors, exclusive of the Grand Jury, to serve at the December term, 1925, of the Circuit Court of said County as provided by Section 5793 of Shannon's Annotated Code. In addition to this regular panel the term (December 1925) the Court directed the sheriff to summon from the body of the County six additional names to serve during that term of Court. Pursuant to this order the sheriff, or his deputies, summoned the following Jurors, to-wit: W. H. Baker, Earl Bishop, H. H. Orgain, C. H. Osborne, Charles Elliott and J. J. Beck, all of whom appeared in Court on the second day of the term, and were qualified in open Court as talesmen to serve as Jurors during the term.

"When the instant case was called for trial, and after the state and the defendant had announced ready,

the defendant moved the Court to have the regular jurors who had been regularly appointed by the Quarterly County Court, to take their seats in the jury box.

"The Court overruled this motion and directed that the record show that prior to its being made, the instant case had been called for trial; that both the state and the defendant had announced ready, and the state had accepted the jury, composed in part, of the Jurors hereinbefore named, who had been summoned by the sheriff, or his deputies, pursuant to the order of the Court hereinbefore referred to. To this action of the Court the defendant excepted.

"Thereupon the defendant challenged for cause the jurors who had been summoned by the sheriff, or his deputies pursuant to the order of the Court because they were selected and summoned by officers financially interested in the event of the case, which motion the Court overruled, and to which action of the Court the defendant excepted.

"The defendant then peremptorily challenged the jurors Beck, Orgain and Elliott, thus exhausting the three challenges to which he was entitled under the statute. He thereupon moved the Court to exclude from the jury the remaining jurors who had been summoned by the sheriff, or his deputies, pursuant to the order of the Court hereinbefore referred to, because selected by officers who were financially interested in the event of the case. This motion was likewise overruled by the Court, to which ruling the defendant excepted. The result was that the defendant

was forced to go to trial before a jury composed, in part, of jurors selected and summoned by the sheriff in the manner hereinbefore stated, with the result hereinbefore stated. * * * *

"However, it results that, for the error of the Court in overruling defendant's challenges for cause, the jurors selected and summoned by the sheriff, or his deputies, who were financially interested in the result of the case, the case will be reversed."

In this same opinion is found:

"It is not necessarily a ground of challenge that the officer who summoned the jury is a witness in that case unless the statute so provides * * * ."

In petitioner's motion no effort was had to have the jury panel quashed on the ground that the sheriff was a witness in the case, that he was unfair or biased or corrupt. It was confined to the charges (a) the sheriff is the attorney of record for the plaintiff; (b) that he is financially interested in the case; (c) that he performed all duties with reference to drawing and summoning the jury; (d) that he as sheriff was custodian of the Court house including the Jury room; (e) that he was the personal attorney of M.V.B. Miller associate counsel in the cause. All evidence was to the contrary.

It will be noted that Fred Ross, Sheriff, was one of the counsel in this case when it was tried first in April, 1939. Thereafter in August he was nominated as sheriff; in November he was elected sheriff for a four-year term, be-

ginning January, 1940. Ross did not have any part in representing respondent on the first appeal. When this cause was reversed by the Supreme Court on its opinion of the first appeal rendered May 6, 1940, Ross advised respondent Miss Moody he could have nothing further to do with the case, that he was prohibited by law from practicing law while serving as sheriff. It was positively shown that he had no financial interest in the case and that respondent so understood it, R. 13, 16. The attorney representing respondent throughout these trials and on all appeals also testified Fred Ross would receive no part of any fee from the cause, had no financial interest in the cause, R. 22.

Counsel's statement on page 2 of the petition that Miller was attorney for Ross has no foundation. In fact, Ross had no occasion for an attorney the two years he had been sheriff. The record doesn't show he ever consulted an attorney during that time, R. 14.

It is seen at a glance that there is no proof supporting the motion to quash the panel, that under the holding of the Oliphant case cited above and relied on by petitioner, the trial court of Lauderdale County, Mississippi, was correct in its ruling. This question had already been decided adversely to petitioner's contention by the ruling of the Mississippi Supreme Court in the decision of the second appeal of this cause.

At this point we call the Court's attention to the following in counsel's brief: "It should be observed from the statutes mentioned above that no step may be taken for the selection, drawing, and summoning the jury without the concurrence of the sheriff," Petitioner's brief, P. 28,

and "The names could not be placed in the jury box without his concurrence," Petitioner's brief, P. 37. Counsel is in error. The sheriff has no duty or part in selecting the names of the jurors placed in the jury box. It is not so charged in the motion to quash the jury panel. The following is from the motion:

"IV

"That the said Fred A. Ross, acting through himself or his deputies, has performed all of the duties laid upon the (fol. 17) Sheriff by law in the drawing and summoning of the juries constituting the panel for the week at which said case is set for trial." R. 9.

Counsel on page 18 of petitioner's brief cites only a part of Section 2033 of the Mississippi Code of 1930. The whole section shows counsel has no foundation for an assertion that the sheriff has any duty in connection with the selection of or placing jurors names in the jury box.

Section 2033 of the Mississippi Code of 1930 is as follows:

"2033. How list of jurors procured.—The board of supervisors at the first meeting in each year, or at a subsequent meeting if not done at the first meeting, shall select and make a list of persons to serve as jurors in the circuit court for the twelve months beginning more than thirty days afterward, and as a guide in making the list they shall use the registration book of voters, and shall select and list the names of qualified persons of good intelligence, sound judgment, and fair character, and shall take them as nearly as they conveniently can, from the several supervisor's dis-

tricts in proportion to the number of qualified persons in each, excluding all who have served on the regular panel within two years, if there be not a deficiency of jurors. Said clerk shall put the names from each supervisor's district in a separate box or compartment, kept for the purpose, which shall be locked and kept closed and sealed, except when juries are drawn, when the names shall be drawn for each box in regular order, until a sufficient number is drawn. The board of supervisors shall cause the jury box to be emptied of all names therein, and the same to be refilled from the jury list as made by them at said meeting. If the jury box shall at any time be so exhausted of names as that a jury cannot be drawn as provided by law, then the board of supervisors may at any regular meeting make a new list of jurors in the manner herein provided."

The proof shows without dispute that the Circuit Clerk is custodian of the jury box, that he, together with the Chancery Clerk, a Mr. Howard Cameron, a cousin of counsel for the petitioner and Mr. Isaacs, deputy sheriff drew the names from the jury box for all five weeks of Court as is provided by law, that as to the manner of the drawing, the testimony of Deputy Sheriff Isaacs is undisputed. It is as follows:

"Q. When you picked up a slip what did you do?

"A. I passed it to Mr. Ferrill. He read the name and Mr. Bledsoe typed it.

"Q. Was there any effort at all to obtain any particular juror?

"A. No, sir, every one as I picked it up I would pass it over. I didn't even read the thing myself.

"Q. Didn't look at it yourself?

"A. No, sir.

"Q. Didn't know who it was?

"A. No, sir.

"Q. Now, the circuit clerk is the custodian of the jury box?

"A. Yes, sir.

"Q. Where was it drawn?

"A. In his office, back office.

"Q. In the circuit clerk's office?

"A. Yes, sir." R. 24.

The holdings in cases cited by petitioner on the question of the quashing the jury panel are contrary to his contentions here. The case of *Ulmer v. Pistole,* 115 Miss. 435, 76 So. 522, is cited by petitioner:

"Appellant contends that the court erred in refusing to sustain the challenge and motion of defendant to quash the entire panel of jurors summoned to serve during the week of court in which this case was set for

trial, on the ground that W. R. Pistole, a brother of appellee W. H. Pistole, was the chancery clerk of Lauderdale county, and was clerk of the board of supervisors, and as such assisted in selecting the list of jurors and in drawing the names from the box to serve as jurors at that term of court while this case was pending for trial therein. It is urged that:

" 'For sound reasons of public policy the appellant should not have been forced to bear any of the possible consequences of the situation, even though no actual fraud was shown to have been committed.'

"This principle contended for by appellant is well established in the common law, and is based upon the old idea that a person should not be placed in a position where there will arise a conflict between interest and integrity; that the temptation to do wrong should not be afforded by opportunity for fraud. We do not dispute the soundness of this view, and in proper cases the application of this principle should be made, but the case before us does not come fairly within this rule. The record here discloses that the testimony taken on the hearing of the motion demonstrated clearly and conclusively that no fraud was committed in securing the jury under the directory terms of the statute providing the method of obtaining jurors. It appears that the chancery clerk did not as clerk of the board of supervisors select the names placed in the jury box, but this was done by the members of the board of supervisors from their respective districts. In drawing the list of jurors from the box the clerk did not select the names, but drew them in a mechani-

cal way, not having any discretion or knowledge as to what names would be drawn as jurors for the term of court. The undisputed proof in the record shows that the clerk did not in any way select or discriminate in the drawing of the jurors from the box. So it abundantly appears that no fraud was practiced, and that there was little or no opportunity for fraudulent conduct. Section 2716, Code 1906, provides that 'a challenge to the array shall not be sustained, except for fraud.' Under the particular facts here we cannot say there was fraud or even a well-grounded suspicion of it." *Ulmer v. Pistole,* 115 Miss. 435, 76 So. 523.

The Pistole case makes it clear that there was no error in the trial court's action in overruling petitioner's motion to quash the jury panel. That decision was controlling on the Mississippi Supreme Court and is likewise controlling on this Court, because there is nothing repugnant to the Federal Constitution therein. The only other decision cited by counsel that even is remotely helpful is the case of *Lipscomb v. State,* 76 Miss. 223, 25 So. 158.

In that case is found:

"But, again, if the appellant had a fair and impartial trial, what right has he to complain that the duties of a ministerial office pertaining thereto were performed by one person rather than another, if it appear, as it does in this case, that nothing prejudicial to him or his rights was done by the person who did in fact exercise the functions of the office? We think he has none, and we cannot find warrant, in any view of the case, for reversing the conviction appealed from

because the court required the coroner, against whom no objection was averred, to act as sheriff during the trial." 76 Miss. 246.

In the case at bar the only duties performed by the sheriff were ministerial duties, that of mechanically drawing from the jury box a slip containing a prospective juror's name and, without looking, pass it on to the Chancery and Circuit clerks to be by them read and listed, and summoning the jurors selected. There is no charge that he failed to summon a juror listed, no charge that he failed in any respect to do his full duty or that he was guilty of any wrong or attempted wrong is summoning the jury.

The matter of whether the jury panel should be quashed was not a new question on the third trial. Ross was sheriff when the second trial was had. A motion to quash the panel then was had, based on the grounds, the present motion is based on and the additional ground that a mandatory provision of Mississippi Jury Statutes was not followed. In deciding the second appeal of this cause, the Mississippi Supreme Court said:

"The main ground urged for reversal of the judgment is the action of the court in overruling appellant's motion to quash the panel for the week, from which the jury was to be drawn to try the case. Only twelve of the jurors drawn from the jury box qualified. The tales-jurors were summoned by a constable of the county, under the direction of the judge. They were not drawn from the jury box as required by chapter 304, Laws of 1938. The officer summoning the tales-jurors were given the following instructions

by the Court: 'You can get them in town. I don't want you to take time to go out in the country. Now take this in record. I want you to get me good, fair, honest citizens, scattered from the county as much as you can by going in the city and bringing them up. I want you to bring me men that have not served on the jury in two years. You ask them that question and ask them if they are qualified voters. That is all you ask them. I don't want a bunch of men that have served on the jury in two years and delinquent voters brought up here on the expense of the county. Understand, thirteen, and get them for me as soon as you can, and you are working under the direction of this court as an officer of this court, and bring them in just as quick as possible, Mr. Bell. As you pick up one, have him come direct to me and report to me.'

"There was a jury box from which to draw the talesmen. The question is whether chapter 304 is mandatory or merely directory. We are of opinion that it is mandatory, and that the action of the court in summoning the talesmen was a complete departure therefrom. There was no pretense whatever of obeying the statute. * * * * 'The action of the county court, therefore, was not an irregularity; it was a procedure wholly beyond and outside of the law—a proceeding directly in the face of our statutes. The curative statute has no application to such a case. *Shepherd v. State,* 89 Miss. 147, 42 So. 544, 10 Ann. cas. 963; *Cook v. State,* 90 Miss. 137, 43 So. 618; *Lee v. State,* 138 Miss. 474, 103 So. 233; *Ellis v. State,* 142 Miss. 468, 107 So. 757'. The outstanding purpose of the statute was, so far as possible, to prevent the juries from being tamp-

ered with.

> "This question was properly raised in the court below by motion to quash the panel before the trial, and on motion for a new trial. It was not involved in the former appeal." 2 So. 2d 815.

The Mississippi Supreme Court in the decision of the second appeal would not have hesitated to also have held that the panel should have been quashed because of Ross' interest if it had been impressed that there was any merit in that ground. The cause was going back for a new trial. Ross, the chances were, would still be in office when the case was to be tried anew. The opinion was to be the guide for that trial. The above opinion was from the Court in Banc. No one of the six justices seemed the least bit impressed with cousel's contention that the jury panel should have been quashed because of Ross' interest. This contention has twice been before the Court, twice rejected.

Due process in the Fourteenth Amendment of the Constitution is due process according to the Constitution and laws of a particular state and not according to the other states of the United States. *State v. Felch,* 105 Atl. 23, 92 Vt. 477.

This Court, speaking through its Justice Cardozo in *Snyder v. Massachusetts,* 78 U. S. Rep. (Lawyer's ed.) 677, said:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so

doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. (citing cases) Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser."

There is no merit in petitoner's contention that it is entitled to a review by this Court of this cause because due process was denied it.

(b) Equal Protection

Petitioner contends:

"That the action of the Supreme Court of Mississippi in declaring that no judgment should be allowed to stand where the trial had proceeded so far afield from the issues joined, and into wholly collateral matters, that it could not be determined whether or not the verdict was rendered upon the issues joined or upon the collaterals, establish the law of the case, as well as the law of the State of Mississippi; and its subsequent action in affirming the judgment here under review amounted to a denial to petitioner of equal protection of the law." Petitioner's Brief, P. 25.

Petitioner's argument in support of the above is based principally on misstatement of fact and misleading statements.

In the opinion rendered on the first appeal reported in 189 Miss. 284, 195 So. 683, is found:

"It is difficult to tell in the peculiar course which the trial took, whether plaintiff was relying (1) upon an alleged dereliction of duty of the employer as regards a particular mechanical instrumentality, or whether (2) upon dereliction in respect to the general system or situation which the employer is alleged to have allowed to prevail, and whether out of this, the negligence charged is to be found in the failure to use reasonable care to furnish a reasonably safe place to work. If we should look to the testimony of plaintiff herself, who alone witnessed the accident, we would conclude that the theory first stated was the one relied on; but when all the testimony introduced by plaintiff and her cross-examinations of defendant's witnesses, and the instruction obtained by her on the issue of liability are considered, it would seem that the second theory is made the chief reliance for the maintenance of plaintiff's case. The declaration is in rather general terms, and no bill of particulars was requested." * * *

"It was error, therefore, to give, in the case here before us, an instruction to the jury on the theory of a safe place to work" * * * *

"Upon the whole, it is our conclusion that the case should be retried upon clear-cut issues, upon instructions which lead to these issues, and wherein collateral issues shall be properly confined, and this by both sides to the case,—appellant being not entirely without fault on this score in this record. We cannot deal with everything covered in the more than 300 pages of the briefs in this case, but must in a few words

refer to four other matters: (1) The release pleaded cannot be sustained and ought to be omitted in a new trial. (2) The contention that the neb and clearer board were simple devices within the simple tool doctrine is not well founded. (3) The defense of assumption of risk has no place in the case, and the record and the testimony should not be cluttered up by it." *J. W. Sanders Cotton Mill, Inc., v. Moody,* 195 So. 683.

Before a retrial of this cause after the above opinion was had, the declaration was made more specific by amendment. When the case was tried the second time, it was tried in conformity to the opinion of the Mississippi Supreme Court's decision of the first appeal. The evidence was confined to the only one defect in the machinery, to-wit, the one causing injury of plaintiff. The error pointed out in the instruction on liability was avoided, and plaintiff's evidence, if not petitioner's, was much restricted as to collaterals.

On the appeal by petitioner everything that it urged for a reversal on the first appeal was again urged for reversal on the second appeal with the additional ground that the trial court erred in not quashing the jury panel because (a) The mandatory statute requiring all tales-jurors as well as petit jurors be drawn from the jury box; (b) the further grounds as set out on 9 and 10 of the present record in regards to the jury being drawn by Sheriff Ross, whom it was urged was attorney of record for respondent, financially interested, etc.

Responding to the numerous points urged for reversal in petitioner's appeal, the Mississippi Supreme Court sit-

ting in Banc in its decision of the second appeal, after holding that the jury statute of Mississippi requiring that all jurors, tales as well as regular jurors, be drawn from the box had not been complied with and that the case should be reversed for another trial solely on that ground, said: "We notice no other grounds for reversal. As heretofore stated, there have been two trials of the case and two appeals to this Court. All questions involved on both appeals have been thouorghly and ably argued." *J. W. Sanders Cotton Mill, Inc., v. Moody,* 191 Miss. 604, 2 So. 2d 816.

The third trial of this cause was had in conformity with the opinion rendered by the Mississippi Supreme Court in its decision of the second appeal. There were on the third trial nothing new. The pleadings, witnesses and evidence were the same and nothing for the Mississippi Supreme Court to write about, so the case was affirmed by it without an opinion.

Petitioner urges that the same errors that caused a reversal on the hearing of the first trial were put into the record on the third. To give color to his contention he quotes a few lines from the first opinion rendered by the Mississippi Supreme Court in this cause but carefully refrains from quoting that part of the opinion dealing specifically with collaterals. In that opinion is found:

> "In view of the general attitude of this record there are several other instances which occurred in the taking of the testimony which cannot escape the attention of an examiner who would responsibly grasp its import, and wherein collateral matters were unduly pursued. For instance, in the cross-examination of

> the witness, Anders, the spinner foreman of the mill. It may be that the methods of this mill in that it had no concern whatever as to the welfare or safety of its workers; that it engaged in the indirect subornation of witnesses; that its harsh course of work might be described as the stretch-out system, about which this witness was taken so severely in hand on cross-examination, may, if true, have made this concern an undesirable member of the community; but there is too much danger in allowing examinations to go to such lengths that the particular merits may be obscured and that passion may be aroused by these extraneous considerations. * * * * "and wherein collateral issues shall be properly confined, and this by both sides to the case,—appellant bein gnot entirely without fault on this score in this record." *J. W. Sanders Cotton Mill, Inc.*, 195 So. 683.

The collateral matters, as they are designated by petitioner are grouped on page 20 and 21 of its brief, are not collaterals. They are vital to issues involved.

Testimony about breaking of thread at various times and places, that operators moved fast and used hooks and instruments and where an operator's eye were centered at other times and places, how each operator performed the duty of spinning and how respondent performed the duty were not collaterals. Without testimony along the line petitioner designates here as collateral, the jury could not have passed on the question of whether respondent was using due care, whether she was guilty of contributory negligence, whether her own negligence was the sole cause of her injury, whether "the evidence showed there was a safe way to do the work as distinguished from an unsafe way,

and that respondent chose the unsafe way."

The above line of testimony, much of it being developed by petitioner, informed the jury as to the manner of the work, the implements used by the operators in the work, that there were duties constantly requiring eyes to be on the work being done, leaving no opportunity to an employee whose duties kept them on the move to be able to be looking out for the place of a defect. The usual method of work by spinners was a fact necessary to be shown. Otherwise, the jury could not pass on whether there was a safe way used there and whether respondent departed therefrom and adopted an unsafe way. All of the above line of testimony was gone into by petitioner as well as respondent. Petitioner complains about the showing of the age of the spinning frames. It developed that respondent had worked at these frames thirty years or longer, R. 75. Petitioner contends that error was put into the record by evidence on how the work of spinning was done three years, eighteen years before respondent was injured. Petitioner went into how the work was done thirty-five years before, R. 85. The machines were placed in the mill near the close of the nineteenth century. The respondent began her employment at that time. The method of performing their duties of employment never changed from that time on. Respondent was used to teach apprentices how to spin. She taught for petitioner the method she learned, R. 118, 119, 120. Petitioner is mistaken about showing anything that happened in other mills. A witness was asked if he had ever been in other mills, but the next question confined the method of operation to the mill in question, R. 138.

Petitioner here does not base its contention that it was not afforded equal protection on a claim that it had been arbtirarily accorded different treatment from others under like circumstances. The contention is that it received different treatment from one division of the Mississippi Supreme Court from that accorded it by the other division of that Court. Petitioner contends that as Division B of the Mississippi Supreme Court reversed and remanded this cause twice, that the equal protection clause of the Federal Constitution requires that it be reversed an equal number of times by Division A of the Mississippi Supreme Court.

Petitioner is wrong on its contention of fact as well as the law. Pages 26, 27, and 28 of petitioner's brief bring to the Court's attention the provision of the Mississippi Constitution creating Division A and B of the Court and also providing for six justices for the Court. It is repeatedly urged that Division A of the Mississippi Supreme Court denied the petitioner equal protection as it did not reverse this cause as did Division B of that Court, that in both appeals the facts were the same. The case on neither of the three appeals has been before Division B of the Court. The cause was before Division A on the first appeal, before the Court in Banc on the second appeal, and was affirmed by Division A on the third appeal.

What is sought to be done is put the Mississippi Supreme Court in a ridiculous light before this Court by picking out a few isolated bits of evidence regarding what counsel chooses to call collaterals, call this Court's attention to an excerpt from the Mississippi Supreme Court's decision on the first appeal of this cause, in which it was held the

plaintiff went too far into collateral matters, and lead this Court to believe that justices of the Mississippi Supreme Court deciding this cause on the third appeal had not theretofore taken part in the decision of this cause, were altogether unfamiliar with it until it reached them on the third appeal and that they entirely overlooked the holdings of the Court handed down by other justices of the Mississippi Supreme Court on the decision of the first appeal of this cause. The facts are that all six of the justices of the Mississippi Supreme Court have considered this case twice and the Chief Justice, who presides over Division A, took part in all three decisions.

It is not often a lawyer of any experience will again fall into the same error pointed out by an appellate court on a retrial of a case. The decision of the Mississippi Supreme Court delivered in Banc on the second appeal of this cause pointed out that the only error it again reversed the cause on was not even involved in the first appeal. The Court in its opinion said: "We notice no other grounds for reversal." *J. W. Sanders Cotton Mill, Inc., v. Lula Moody,* 191 Miss. 604, 2 So. 2d 815. Therefore, it is clear on the second trial of this cause error was not committed in regards to evidence. On the second and third trials the pleadings and evidence were substantially the same. Therefore, the law announced by the Mississippi Supreme Court on its decision of the appeal from the second judgment became the law of the case for its decision of the appeal from the third judgment in this cause. If counsel is in the least candid with the Court, he will not contend that there were different witnesses or that their testimony was different on the second and third trials of this cause. As the trial court on the third trial avoided the errors pointed out by

the appellate on the second appeal, there was nothing for the Mississippi Supreme Court to do but follow its pronouncements and affirm this cause on the decision on the third appeal.

By contending that there is a conflict in the holdings of the Mississippi Supreme Court in its decision of the first and third appeals of this cause, petitioner seeks to have this case passed on as fully as if it had been appealed directly to this Court instead of the Mississippi Supreme Court.

Counsel complains of the argument of respondent made on the third trial. There was not a hint in the Mississipp Supreme Court's decision of the first appeal of this cause about improper argument. There can therefore be no conflict in that respect between the Mississippi Supreme Court's holdings on the first appeal and third appeal.

The only reason petitioner raises no point here as to the instructions the ones used on the third trial were copied verbatum from those approved by the Mississippi Court on the second trial.

We refuse to go off into matters that cannot even under the theory of review advanced by petitioner be pertinent here.

If it be conceded that there is conflict in the opinions of the Mississippi Supreme Court as counsel contends, this would not entitle petitioner to a review here. Again and again this point of law has been decided adversely to pe-

titioner's contention by this Court.

In *Jones v. Buffalo Creek Coal Co.*, 245 U. S. 328, 38 Sct. 121, 62 U. S. (Lawyer's ed.) 325, is found:

> "It was the contention of the plaintiff below that the records and papers in the three suits established title in those under whom it claims; and also that the decrees in those suits created res judicata as against the defendants, because their predecessors in title had been parties or privies to those suits. The defendants below contended, among other things, that the premises in question were not within the tracts affected by one or more of the decrees in those suits, and that they were not bound by any of them. It is conceivable that the defendants below were right in whole or in part, and that the trial judge erred in admitting some or all of the evidence objected to and in rendering judgment for the plaintiff. But error of a trial judge in admitting evidence or entering judgment after full hearing does not constitute a denial of due process of law. *Central Land Co. v. Laidley*, 159 U.S. 103, 112, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80." 62 U.S. (L. ed.) 326.

In volume 6, Section 44, R.C.L. and supplements are collected many decisions of this Court on this point.

Petitioner has had his day in Court. His case was passed on three times by the Circuit Court of Lauderdale County, Mississippi, and four times by the Supreme Court of Mississippi. The rules of law applying in the jurisdiction where petitioner, a Mississippi corporation, was sued were applied. We submit there were no errors made

by the Circuit Court or by the Supreme Court in hearing of this cause, but if errors were made, this Court is without authority to rectify those errors under the above authorities.

Petitioner has been accorded due process of the law and equal protection of the law according to the jurisdiction in which its case was tried. No Federal questions are involved, such as require a decision of this Court.

CONCLUSION

The decision of the Supreme Court of Mississippi is manifestly correct and presents neither a conflict of decision or any Federal question of general importance. The petition should therefore be denied.

Respectfully submitted,

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M. W. Reily

Of Counsel